141

No. (1)

Supreme Court, U.S.
FILED
09-375 SEP 24 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

BALDASSARE AMATO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

David I. Schoen
Counsel of Record
Attorney at Law
2800 Zelda Road
Suite 100-6
Montgomery, AL 36106
(334) 395-6611

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

Whether it violates a criminal defendant's Fifth and Sixth Amendment fair trial rights to exclude, pursuant to Rule 613(b) of the Federal Rules of Evidence, extrinsic evidence of the main prosecution witness's material prior inconsistent statements after the witness/declarant has been given the opportunity on cross-examination to explain or deny the statements and denies them?

TABLE OF CONTENTS

Page:

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

A. Relevant Underlying Facts Which Frame the Issue 3

1. Mr. Amato and the Charges Against Him at Trial 3

B. Background Relevant to Vitale's Trial Testimony and His Prior Inconsistent Statements 5

C. Some Examples of the Relevant Testimony Providing the Foundation Under Rule 613(b) 7

D. Proceedings Below 13

REASONS FOR GRANTING THE PETITION 15

1. The Trial Court's Application of Fed. R. Evid. 613(b) Conflicts with Decisions on its Application in all Circuits Around the Country, There is a Split of Authority Among and Within the Circuits and This Court Has Not Yet Written on This Issue and Must Resolve the Various Conflicts on Issues Arising with Respect to the Rule's Application and the Exclusion of Extrinsic Evidence of Prior Inconsistent Statements Under Rule 613(b) 15

2. The Trial Court's Decision in Misapplying Fed. R. Evid. 613(b) to Exclude Critically Material Extrinsic Evidence Was Erroneous, Violated Fundamental Constitutionally Protected Fair Trial Rights, and the Question Presented is Important 19

CONCLUSION 38

APPENDICES:

Order:
United States Court of Appeals
for the Second Circuit
entered January 12, 2009 ..... A-1

Memorandum and Order
The United States District Court
for the Eastern District of New York
entered June 27, 2006 ..... A-11

Order
Re: Denial of Rehearing
United States Court of Appeals
for the Second Circuit
entered April 27, 2009 .....A-27

TABLE OF AUTHORITIES

Page:

Cases:

Chambers v. Mississippi,
410 U.S. 284 (1973) 21, 30

Chapman v. California,
386 U.S. 18 (1967) 30

Crane v. Kentucky,
476 U.S. 683 (1986) 30

Jiminez v. Walker,
458 F.3d 130 (2d Cir. 2006) 29

State of Vermont v. Danforth,
184 VT 122; 956 A.2d 554 (2008) 16, 17, 18

United States v. Agajanian,
852 F.2d 56 (2d Cir. 1988) 25

United States v. Agurs,
427 U.S. 97 (1976) 29

United States v. Barrett,
539 F.2d 244 (1st Cir. 1976) 16, 17, 37

United States v. Bibbs,
564 F.2d 1165 (5th Cir. 1977) 18, 37

United States v. Bonnett,
877 F.2d 1450 (10th Cir. 1989) 16

United States v. Cutler,
676 F.2d 1245 (9th Cir. 1982) 16

United States v. Elliott,
771 F.2d 1046 (7th Cir. 1985) 16

United States v. Greer,
806 F.2d 556 (5th Cir. 1986) 16, 18

United States v. Hames,
185 Fed. Appx. 318
(5th Cir., June 12, 2006) 18

United States v. Harvey,
547 F.2d 720 (2d Cir. 1976) ..... *passim*

United States v. Hudson,
970 F.2d 948 (1st Cir. 1992) 27

United States v. Richter,
826 F.2d 206 (2d Cir. 1987) 24

United States v. Rose,
403 F.3d 891 (7th Cir. 2005) 17, 37

United States v. Schnapp,
322 F.3d 564 (8th Cir. 2003) 25, 28

United States v. Strother,
49 F.3d 869 (2d Cir. 1995) 21

United States v. Surdow,
121 Fed Appx. 898
(2d Cir., February 9, 2005) 18

United States v. Sutton,
41 F.3d 1257 (8th Cir. 1994) 16

United States v. Tropeano,
252 F.3d 653 (2d Cir. 2001) 30

United States v. Wilson,
490 F. Supp.713 (E.D. Mich. 1980) .....*passim*

United States v. Young,
86 F.3d 944 (9th Cir. 1996) 17, 37

United States v. Young,
248 F.3d 260 (4th Cir. 2001) 28

Washington v. Texas,
388 U.S. 14 (1967) 30

Wimington Trust Company v.
The Manufacturer's Life Insurance Company,
749 F.2d 694 (11th Cir. 1985) 17, 36

Statutes:

18 U.S.C. § 1962(d) 3

28 U.S.C. § 1254(1) 1

Rules:

Fed. R. Evid. 403 28

Fed. R. Evid. 611(a) 27

Fed. R. Evid. 613 ..... 1, 19

Fed. R. Evid. 613(b) ..... *passim*

Fed. R. Evid. 801(d)(2) 2, 31

Other Authorities:

613 *Federal Rules of Evidence Manual* 613.02 19

4-613 *Weinstein's Federal Evidence* Sec. 613.05 ..... *passim*

5-613 *Weinstein's Federal Evidence* Sec. 613 App.100 31

Goode & Wellborn, Courtroom Handbook on Federal Evidence, Rule 613 (2005) 20

McCormick, *Evidence*, § 41 (2d Ed. 1972) 33

Queen Caroline's Case, 2 Brod. & Bing., 284, 129 Eng. Rep. 976 (1820) 30, 31

S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual*, (3d ed. 1982) 37

Slough, *Impeachment of Witnesses: Common Law Principles and Modern Trends*, 34 Ind. L.J. 1 (1958) 28

Wright & Gold,
Federal Practice and Procedure:
Evidence § 6205, p. 527 (2006) 20, 21

PETITION FOR WRIT OF CERTIORARI

Baldassare Amato respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The denial of panel rehearing and rehearing *en* banc, dated April 27, 2009 (App., *infra.*, 27A-28A) is unreported. The opinion of the court of appeals (App., *infra.*, 1A-10A) is reported at 306 Fed. Appx. 630 (2d Cir., January 12, 2009). The Memorandum and Order of the district court (App., *infra.*, 11A-26A) is reported at 2006 U.S. Dist. LEXIS 43366 (E.D.N.Y., June 27, 2006).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. The court of appeals denied panel rehearing and rehearing *en banc* on Mr. Amato's co-defendant's petition for rehearing and for rehearing *en banc* on April 27, 2009. On July 21, 2009, Justice Ginsburg granted an extension of time within which Mr. Amato could file a petition for certiorari to and including September 24, 2009. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Rule 613 of the Federal Rules of Evidence provides as follows:

> 613. Prior Statements of Witnesses
>
> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness,

> whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

STATEMENT OF THE CASE

The Petition presents this Court with the opportunity for the first time to address the foundational requirements for the admission of extrinsic evidence of a trial witness's prior inconsistent statements under Rule 613(b) of the Federal Rules of Evidence, where such prior inconsistent statements are critically material to the defense theory of the case, would undermine the prosecution's theory of the case and the credibility of its primary witness, and directly implicate the defendant's constitutionally protected rights to compulsory process, to confront witnesses against him, to due process of law, and to a fair trial.

The Court should grant the Petition to resolve conflicts among the various federal circuit and district courts around the country and internal conflicts within the various circuits. This Court's

guidance on this frequently recurring issue is badly needed. The Court also should grant the Petition to correct the miscarriage of justice that occurred in this case as a result of the trial court's exclusion, pursuant to a misapplication of Rule 613(b), of the fundamentally important extrinsic evidence of the primary witness's prior inconsistent statements which inculpated himself, rather than the defendant.

A. Relevant Underlying Facts Which Frame the Issue

1. Mr. Amato and the Charges Against Him at Trial

Petitioner, Baldassare Amato was tried before a jury in the Eastern District of New York on a superseding indictment charging him with RICO conspiracy, 18 U.S.C. § 1962(d), predicated on five racketeering acts. The two most serious racketeering acts each charged a murder and a related murder conspiracy. The crimes charged were alleged to have been committed in furtherance of the interests of the Bonnano organized crime family.

The indictment alleged, *inter alia,* that on May 5, 1992, Amato murdered Robert Perrino, a New York Post delivery superintendent who was associated with the Bonnano family and involved in illegal activity at the Post.

The prosecution theorized that the Bonnano family feared Perrino would cooperate in an investigation of that activity, and the "consigliere" and "underboss" of the family ordered his murder. According to the Government, Amato, a Bonnano family "soldier," was recruited to shoot Perrino.

The defense contended that the underboss, Salvatore Vitale ("Vitale"), who later would become a cooperating witness, feared Perrino would implicate him and his son in the illegal activity and that Vitale had Perrino murdered by persons close to Vitale, not by Amato.

The defense theory, for which the prior inconsistent statements were an integral part, was that Vitale earlier had admitted his true involvement in the murder to others; but later pinned it on Amato to protect his (Vitale's) close associates who helped him (Vitale) with the murder. Vitale's prior statements to the other witnesses, before he falsely implicated Mr. Amato, were inconsistent with his trial testimony and were critically material to the defense theory and presentation of the case.

It was further alleged that on February 27, 1992, Sebastiano DiFalco, an accountant and restaurateur said to be associated with the Bonnano family, was murdered by persons unknown at the direction of Amato, who was close to DiFalco and reputedly partners with him in a restaurant. The prosecution theorized that Amato believed DiFalco was stealing from him. The defense contended that Amato was not DiFalco's partner, but his friend, and had no motive to kill him, and that Vitale implicated Amato gratuitously in the long-unsolved murder, through hearsay to bolster his (Vitale's) fabricated implication of Amato as to the Perrino murder.

Mr. Amato has at all times maintained his innocence with respect to the charges against him.

B. Background Relevant to Vitale's Trial Testimony and His Prior Inconsistent Statements

Vitale was charged in 2003 with the murder of Perrino. In 2002 Cantarella had also been charged with that crime. Both testified for the Government in 2004 at the trial of Massino, the former boss of the Bonanno family. Their testimony at the Massino trial, disclosed as "3500 material" to Amato well before his trial in 2006, diverged in a material respect regarding the Perrino murder: Cantarella at the 2004 Massino trial testified that Vitale said he was concerned that Perrino would cooperate about criminal activity at the Post and Vitale wanted him killed; Vitale testified, as he would at Amato's trial, that it was Cantarella who was concerned and wanted Perrino killed.

From Cantarella's contradiction of Vitale developed Amato's theory of defense: Vitale had a strong personal motive for killing Perrino: he feared Perrino would implicate him and his son in the illegal activity at the Post and he had Perrino murdered by associates whom he was protecting, not Amato. After implicating Amato in the Perrino murder, Vitale shored up that claim by gratuitously implicating Amato--albeit through hearsay--in the DiFalco murder, after learning that Amato was considered a suspect. Amato believed and pursued a defense at trial based on the belief that again it was Vitale behind the DiFalco murder.

At trial, despite having furnished Amato with the 3500 material for both Vitale and Cantarella, the Government called only Vitale. He adhered to his position that he had no personal interest in killing

Perrino and he denied telling Cantarella otherwise. Amato confronted Vitale with his prior inconsistent statements and Vitale denied making them.

Amato's defense was scuttled by the court, however, when at the end of the prosecution's case the court granted the Government's motion to preclude Amato from calling Cantarella to contradict Vitale's testimony that he had never told Cantarella he was concerned Perrino would cooperate and wanted him killed.[1] The trial court's decision was based on a misunderstanding and misapplication of Rule 613(b) of the Federal Rules of Evidence and its foundational requirements.

The trial court acknowledged that the prior statements at issue were inconsistent and acknowledged that Vitale was given an opportunity to explain or deny them on cross-examination; but the court then grafted on two additional requirements for admission not required either by Rule 613(b) or by any other court in the country. It went well beyond Rule 613(b) and required further (1) that the prior inconsistent statements somehow have to be highlighted during the cross-examination and (App. *infra.*, 21A-22A) (2) that the party seeking to offer the prior inconsistent statement extrinsically through another witness, announce his intention and identify the witness(es) well in advance. (App. *infra.*, 24A) This ruling, which finds no support in the law, denied Mr. Amato his constitutional right to

---

[1] The court's ruling under Fed R. Evid. 613(b) also precluded Amato from calling James Tartaglione-a former Bonnano family "acting boss" cooperating with the Government--to elicit a prior inconsistent statement of Vitale, as discussed further below.

a fair trial and to exercise his fair trial rights, including his rights to due process, to present a complete defense, compulsory process and to confrontation and has led to his sentence of life in prison for crimes he could have shown he did not commit; rather the government's witness did and told others about.

C. Some Examples of the Relevant Testimony Providing the Foundation Under Rule 613(b)

Cantarella's testimony at the Massino trial, furnished by the Government to Amato as 3500 material on May 19, 2006, included the following:

Q. Did Sal Vitale's son have a job at the Post?

A. He had a no-show job.

Q. A no-show job, does that mean he also had a sell off the tail situation?

A. I don't know what his job description was. He was on the payroll and got paid.

Q. He was on the payroll and got paid but he didn't do any work.

A. Correct.

Q. Now, there came a time I believe you said that Sal Vitale approached you to talk about Perrino, right?

A. That's right.

Q. When was that, sir?

A. It had to be right after the -- shortly after we were all arrested in '92.

Q. After you were arrested you had this visit from Sal?

A. I had a visit, no, I met with Sal.

Q. Where?

A. I believe it was in a hotel on Long Island.

Q. Do you remember what hotel it was?

A. I think the Hilton.

Q. At that time, do you remember what year it was?

A. It had to be '92.

Q. Shortly after your arrest?

A. Shortly before he was killed.

Q. And what was the conversation--when was he killed?

A. I believe May of '92.

Q. What did he say to you and what did you say to him?

A. He brought me downstairs to the swimming pool area, he wanted to make sure there was a lot of noise, there was the running of water and he asked if Bobby Perrino was, in my opinion, was showing any signs of weakness and possibly cooperating.

Q. And what was your opinion?

A. I don't see him that often, very seldom do I see him and he didn't show no weakness to me when I did see him?

Q. When Sal had this conversation with you did he tell you he wanted to kill Perrino?

A. Yes.

Q. How long after the conversation began did he tell you he wanted to whack this guy?

A. I don't remember the exact time, it wasn't long.

Q. Did he tell you why he wanted you involved?

A. I guess because I was--I worked at the Post and I could be approachable to Perrino.

Q. When Sal said [D'Amico] should be honored to do something for the family, did you understand this request was being made for the family or it was being made for Sal?

A. I believe it was being made for Sal.

Q. In other words, he was concerned that if Perrino could in some way implicate someone, it would be Sal who might be implicated, that he was concerned about?

A. I believe that's correct.

Q. So, you believed at the time that Sal was lying to both you and D'Amico in order to get this guy killed?

A. Yes. (A-126-28; emphasis added.)

At Amato's trial, Vitale--called as the prosecution's first fact witness--testified on direct examination that it was Cantarella who "felt Bobby was weak, and he felt that Bobby might spill the

beans on what was going on down there, as far as the Bonnano Organized Crime Family." Consequently, according to Vitale, he and Spero decided to kill Perrino.

On cross-examination by Amato's counsel, Vitale was given an opportunity to explain or deny the prior inconsistent statements and he testified as follows:

Q. After he, Mr. Perrino, was arrested and Richie Cantarella and others were arrested, did you speak to Richard Cantarella about this circumstance, the fact that there was an investigation and arrest?

A. Richie spoke to me. He come to find me on Grant Avenue.

Q. On Grant Avenue he came to speak to you?

A. Yes.

Q. And what did he say?

A. He didn't think that Bobby was going to be able to take the weight. He thought that Bobby would flip.

Q. And did he ask you to do something about it?

A. In that context of that conversation he was asking to kill Bobby.

Q. Did you ever meet him in a hotel in Long Island to discuss the situation, Mr. Cantarella, Richard Cantarella?

A. I would meet Richie in a hotel in Long Island also.

Q. Did you meet him with respect to Robert Perrino?

A. I don't recall if we discussed that. It wasn't one conversation--more than one conversation.

Q. Do you recall a meeting at a Hilton hotel in Long Island just shortly before Perrino was killed?

A. I used to meet Richie there.

Q. And did you ask him at that meeting whether Bobby Perrino was showing any signs of weakness?

A. No, I didn't have to. He volunteered that.

Q. Did he tell you in his opinion that Robert Perrino wasn't showing any signs of weakness?

A. He never said that.

Q. Did you tell Richie Cantarella that you wanted to kill Robert Perrino?

A. No. I says to Richie if he has a location in the city, and he knew what I meant by that. After he described the situation--after I discussed it with Spero.

Q. In [sic] he had a location.

A. If he had a location in the city where we could kill Bobby. But you're going into the like third, fourth, fifth conversation. It wasn't all done in one conversation.

Q. You were not the one who suggested to him that Perrino be killed?

A. No. He suggested it to me. And Al Walker was suggesting it to Spero.

Q. Did you have any personal interest in Robert Perrino being killed?

A. Not at all. (emphasis added.)

Amato asked several other questions based on the 3500 material which contained additional material prior inconsistent statements by Vitale to Cantarella and Tartaglione.

During the trial, the government advised that it would finish its direct case sooner than expected. Concerned that the government might not call Cantarella and Tartaglione to the stand, Amato advised the government that he wanted them produced so that he could call them during the defense case to examine them concerning Vitale's prior inconsistent statements.

Claiming to rely on Rule 613(b), the government moved to preclude Amato from calling Cantarella or other cooperating witnesses to impeach Vitale's credibility, complaining that the notice was insufficient. Amato identified the statements at issue, the witnesses he wanted to call to offer the extrinsic evidence of Vitale's prior inconsistent statements, the direct relevance to the whole defense theory.

The court heard argument, during which Amato's counsel provided further details of the prior inconsistent statements about which Cantarella would testify. The Government acknowledged that the issue was only one of timing, not whether the statements were inconsistent, and the court subsequently agreed that they were inconsistent.

On the day the prosecution rested, the court granted the Government's motion under Rule 613(b), ruling that "Amato never confronted Vitale with the purported evidence of the inconsistent statement(s)" or "provided Vitale with sufficient opportunity to explain or deny the prior inconsistent statement" and that Amato at the time of his cross-examination of Vitale did not put the Government on notice and "should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione." Amato expanded his protest to include the denial of his right to compulsory process and to present a complete defense, and the court noted that objection.

D. Proceedings Below

Petitioner Baldassare Amato was tried before a jury in the United States District Court for the Eastern District of New York from May 30, 2006 to July 12, 2006.

On June 27, 2006, following a motion *in limine* by the government to preclude Mr. Amato from calling witnesses to adduce extrinsic evidence of prior inconsistent statements by the government's primary trial witness against Mr. Amato, the district court entered an Order, precluding any and all such extrinsic evidence based on the Court's misunderstanding and misapplication of Rule 613(b) of the Federal Rules of Evidence. (App. *infra.*, 11A-26A) The Court granted the government's motion over Mr. Amato's objections based on his constitutionally protected fair trial rights, including his rights to compulsory process, to due process of

law, to confront witnesses against him and generally to a fair trial.

On July 12, 2006, the jury returned a verdict of guilty as charged. On October 27, 2006, Mr. Amato was sentenced to life imprisonment, lifetime supervised release, a fine of $250,000, and a special assessment of $400.

On January 12, 2009, the United States Court of Appeals for the Second Circuit denied Mr. Amato's appeal, affirming the judgment of conviction and sentence, without ever substantively addressing Mr. Amato's fully briefed claim concerning the Rule 613(b) exclusion of the prior inconsistent statements and the impact of the same on his constitutionally protected fair trial rights. (App. *infra., 1A-10A)*

On April 27, 2009, the Court of Appeals denied a motion for rehearing and rehearing *en banc* filed by Mr. Amato's co-defendant (App. *infra.*, 26A-27A) and this Petition for a Writ of Certiorari to the Second Circuit follows, after an extension for filing the same was granted by Justice Ginsburg.

REASONS FOR GRANTING THE PETITION

1. The Trial Court's Application of Fed. R. Evid. 613(b) Conflicts with Decisions on its Application in all Circuits Around the Country, There is a Split of Authority Among and Within the Circuits and This Court Has Not Yet Written on This Issue and Must Resolve the Various Conflicts on Issues Arising with Respect to the Rule's Application and the Exclusion of Extrinsic Evidence of Prior Inconsistent Statements Under Rule 613(b)

There is a sharp split of authority among the Circuit courts of appeals on several issues surrounding the application of Rule 613(b) which requires this Court's guidance in order to achieve some measure of uniformity in important decisions on the admissibility of prior inconsistent statements which often implicate fundamentally important constitutional rights to due process of law, to confrontation, and to other fair trial rights and which often impact on important commercial dealings as well.

A recent decision from the Supreme Court of Vermont, for example, in analyzing how to apply that State's analog to Fed. R. Evid. 613(b), expressly noted the development of what it characterized as a lenient "minority rule," on the foundation which must be laid and the timing for laying it before a prior inconsistent statement can be admitted under Rule 613(b) and a more stringent rule purportedly adopted by at least six other federal circuits. Under the latter, there purportedly is a firm requirement that for admissibility under Rule 613(b), a

foundation for the prior inconsistent statement must be laid in full while the declarant whose prior inconsistent statements are to be put at issue is on the witness stand. *See, State of Vermont v. Danforth*, 184 VT 122, 129; 956 A.2d 554, 559 (2008)(Joining the "majority" rule in excluding the prior inconsistent statement because notice of the intention to offer extrinsic evidence of the witness's prior inconsistent statement not given until second day of trial, after witness/declarant had testified).[2]

A more comprehensive review of the relevant case law, however, reveals that even on this one issue – whether Rule 613(b) requires that the foundation for the admission of extrinsic evidence of the prior inconstant statement must be laid by cross-examination which confronts the witness/declarant with the prior inconsistent statements while the witness/declarant is on the stand and before the extrinsic evidence of the prior inconsistent statement is adduced through another witness – the split of authority among the Circuits is even more complicated than the Court in Danforth recognized and, indeed, there is a conflict on this very issue even within some of the Circuits the *Danforth* Court put in the "majority" camp. *See e.g., United States v. Wilson*, 490 F. Supp. 713, 719-20 (E.D. Mich.

---

[2] The Court in Danforth, cites the decision in *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) as reflecting the "minority" rule, with the "majority" rule being reflected by decisions in *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989); *United States v. Greer*, 806 F.2d 556, 559 (5th Cir. 1986); *United States v. Elliott*, 771 F.2d 1046, 1051 (7th Cir. 1985); *United States v. Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982). *Danforth*, 184 VT at 129; 956 A.2d at 559.

1980)(holding under 6th Circuit precedent that Rule 613(b) that it is perfectly permissible to call a witness to adduce extrinsic evidence of a prior inconsistent statement, even before the witness/declarant whose statements are at issue testifies or is cross-examined about the prior inconsistent statements and that Rule 613(b) purposely relaxed this foundational requirement, relying on and adopting *Barrett*); The Eleventh Circuit appears to be fully in accord with this position. *See e.g., Wimington Trust Company v. The Manufacturer's Life Insurance Company*, 749 F.2d 694, 699 (11th Cir. 1985).

Moreover, contrary to the *Danforth* Court's understanding of the split of authority and notwithstanding the cases its cites in support of its conclusion concerning the breakdown of the split of authority, other decisions from the very Circuits it posits as being in the "majority" camp of requiring the presentation of the prior inconsistent statements to the witness/declarant on cross-examination while he/she is on the stand and before the extrinsic evidence is adduced, other decisions from these very same Circuits actually hold exactly to the contrary, placing those Circuits fully in line with the First Circuit's "relaxed foundation" view of Rule 613(b) reflected in *Barrett* and characterized in *Danforth* as the "minority rule." *See e.g., United States v. Young* , 86 F.3d 944, 949 (9th Cir. 1996)(reversing lower court and finding only that the witness be permitted "at some point" to explain or deny the prior inconsistent statement); *United States v. Rose*, 403 F.3d 891, 903-904 (7th Cir. 2005)(failure to cross-examine witness/declarant on prior inconsistent statement while on stand and prior to adducing extrinsic

evidence of prior inconsistent statement does not preclude admission under Rule 613(b); procedure is simply to allow witness/declarant to be recalled to stand later and citing 6th, 7th, 8th, and 9th Circuits as being fully in accord with this position).

The Fifth Circuit also appears to have an internal conflict on this subject. *Compare United States v. Greer*, 806 F.2d 556, 559 (5th Cir. 1986)(cited in *Danforth* as being in the "majority" camp requiring strict compliance with advance foundation "rule") *with United States v. Bibbs*, 564 F.2d 1165, 1169-70 (5th Cir. 1977)(allowing admission of extrinsic evidence of prior inconsistent statement even before witness/declarant whose statements are at issue is given an opportunity to explain or deny the prior inconsistent statements) and *United States v. Hames*, 185 Fed. Appx. 318, 322-323 & n.4 (5th Cir., June 12, 2006)(*citing Bibbs* as binding authority and noting conflict among the Circuits).

The Second Circuit has no definitive published decision on the issue, as the Court below in the instant case noted; however, it would appear to be closer to the restrictive rule adopted in *Danforth*. See e.g., *United States v. Surdow*, 121 Fed Appx. 898, 900 (2d Cir., February 9, 2005) (unpublished)(appearing to require either cross-examination of the witness/declarant or advance announcing the intention to use extrinsic evidence of prior inconsistent statements while the witness/declarant is on the stand for admission under Rule 613(b); *United States v. Harvey*, 547 F.2d 720, 723 (2d Cir. 1976)(reversing conviction for exclusion of extrinsic evidence of prior inconsistent statements where witness/declarant was given opportunity on cross-examination in to explain or

deny prior inconsistent statements in advance of proffered extrinsic evidence of prior inconsistent statements and noting in *dicta* that Rule 613(b)'s foundational requirement in that regard is mandatory).

Commentators point to many additional areas of conflict among the various courts regarding additional Rule 613(b) issues. *See* 4-613 *Weinstein's Federal Evidence* Sec. 613.05; 613 *Federal Rules of Evidence Manual* 613.02, n.6.

This Court must act now to provide guidance to the lower courts in light of so much conflict concerning the proper application of Rule 613(b).

2. The Trial Court's Decision in Misapplying Fed. R. Evid. 613(b) to Exclude Critically Material Extrinsic Evidence Was Erroneous, Violated Fundamental Constitutionally Protected Fair Trial Rights, and the Question Presented is Important

Rule 613 was designed to relax the foundational requirements for introduction of a witness's prior inconsistent statement, not to stiffen them. *See* Advisory Committee Note to Fed. R. Evid. 613, Subdivision (b) ("The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness with an opportunity to explain and the opposite party with an opportunity to examine on the statement, with no specification of any particular time or sequence"). The more flexible procedure under Rule 613(b) has been succinctly described as follows:

This means that the modest requirements of Rule 613(b) may be satisfied in two ways. First, these requirements are satisfied if the impeaching party follows the traditional approach, even if the rule does not compel him to do so. Following this approach insures that the witness has an opportunity to explain or deny during the impeaching party's cross-examination and before any extrinsic evidence is offered. This approach further provides the opponent with the required opportunity to examine the witness about the statement since the cross-examination will alert the opponent as to the need to conduct that examination on redirect. Second, the requirements of Rule 613(b) also can be met if the impeaching party ignores the traditional approach. Thus, impeaching counsel can examine the witness without mentioning the statement or providing any of the required opportunities, and then offer extrinsic evidence after opposing counsel has completed his examination and the witness has been excused. So long as the witness then is available to be recalled by opposing counsel, the required opportunities to explain or deny and examine the witness can be provided.

Wright & Gold, Federal Practice and Procedure: Evidence § 6205, p. 527 (2006)(emphasis added)(footnote omitted); *accord* Goode & Wellborn, Courtroom Handbook on Federal Evidence, Rule 613, p. 352 (2005); *see also* Weinstein's Federal Evidence § 613.05[2] (2006) ("Most courts hold that the requirements of Rule 613(b) are met

> if the witness has an opportunity to explain after the contents of the statement are made known to the jury" while "other courts continue to state that the opportunity to explain or deny should precede the admission of extrinsic evidence").

The relaxed rule "permit[s] the impeaching party to maintain surprise and, thus, the effectiveness of impeachment," Wright & Gold, Federal Practice and Procedure: Evidence § 6205, p. 527, but at the same time prevents sharp practice, bad faith, or unfairness, e.g., introducing extrinsic evidence of a prior inconsistent statement after the witness to be impeached is no longer available to deny or explain it. See Weinstein's Federal Evidence § 613.05[4][b].

The Second Circuit has simply stated that a witness's statement may be offered to impeach the witness's credibility if "(1) the statement is inconsistent with the witness's trial testimony, (2) the witness is afforded an opportunity to deny or explain the same, and (3) the opposing party is afforded the opportunity to cross-examine the witness thereon." *United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995).

Here, the court applied Rule 613(b) too rigidly and, in so doing, denied Amato the right to present witnesses in his own defense and a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)("Few rights are more fundamental than that of an accused to present witnesses in his own defense" and a rule of evidence "may not be applied mechanistically to defeat the ends of justice"). Amato did more than he was required to do under the Rule, because he did confront Vitale with the

statements to Cantarella and Tartaglione before seeking to introduce those statements, thereby alerting the Government to address these questions on re-direct, if it so chose.

The court's ruling that Amato at the time of his cross-examination of Vitale did not put the Government on notice and "should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione" (App. *infra.*, 24A) is not supported by the Rule or any case law. Amato's cross-examination of Vitale about the statements was sufficient notice, because "the cross-examination will alert the opponent as to the need to conduct that examination on redirect." Wright & Gold, supra.

This is particularly so here, and a contrary conclusion is particularly irksome, because, unlike cases where the opposing party is ignorant of extrinsic proof of a prior inconsistent statement in the adversary's possession, here the Government furnished the extrinsic proof of Vitale's prior inconsistent statements through the 3500 material of its own cooperating witnesses. The Government was certainly well aware of Cantarella's testimony at the Massino trial concerning the Perrino murder and undoubtedly well aware that it clashed with Vitale's. Indeed, that was very likely a strong factor in the Government's decision not to call Cantarella at Amato's trial. Under such circumstances, to embrace the Government's argument, as the court did (App. *infra.*, 24A), that during Vitale's testimony Amato did not put the Government on notice of his intention to introduce Vitale's prior inconsistent statements through the testimony of Cantarella and

other cooperating witnesses is to defeat the purpose of Rule 613(b) and to allow it to be exploited in unwarranted circumstances.

In ruling that Amato "should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione," (App. *infra.*, 24A), the court appears to have been led astray by the Government's motion, which--selectively quoting and lifting from its context a statement in Weinstein's Federal Evidence--indicated that a party was obliged to "'inform[] the court and opposing counsel, at the time the witness testifies, of the intention to introduce' impeaching extrinsic evidence so that appropriate steps may be taken to comply with Rule 613(b)." (*citing* Weinstein's Federal Evidence § 613.05[5]; emphasis the Government's.) The Government pushed this position at argument of the motion, stating that this is "required by 613(b)," that "Rule 613(b) precisely addresses that," and that according to Judge Weinstein "opposing counsel has to 'inform the court and opposing counsel at the time the witness testifies of the intention to introduce' impeaching extrinsic evidence." (emphasis added.) The court noted this argument and characterized it as the "prevailing practice," to which the court would adhere. (App. *infra.*, 23A)

But this is not at all the thrust of the commentary in the Weinstein treatise, nor is it the law. Rather, the commentary, in full context, is simply saying that this would be an acceptable way of complying with the rule where the witness has not been confronted with the statement: "The impeaching party would seem to comply sufficiently

with the rule by informing the court and opposing counsel, at the time the witness testifies, of the intention to introduce an impeaching statement and that the opponent may therefore prefer to keep the witness available to be called to explain the statement." *Id.*

The commentary assumes that the impeaching party has not confronted the witness with the statement; if the impeaching party has done so, of course, the opponent has already been already put on notice by the cross-examination and may have the witness explain the asserted inconsistency on redirect.

Even more troublesome is the court's ruling that "Amato never confronted Vitale with the purported evidence of the inconsistent statement(s)" or "provided Vitale with sufficient opportunity to explain or deny the prior inconsistent statement." (App. *infra.*, 22A) Not only did Amato provide Vitale with sufficient opportunity to explain or deny the prior inconsistent statements, Vitale did deny them.

It is difficult to imagine what more could have been done to give Vitale an opportunity to deny or explain the statements, other than to ask him whether Cantarella would be lying if he had so testified--an improper question. *United States v. Richter*, 826 F.2d 206, 208 (2d Cir. 1987). Thus, Amato laid an adequate foundation for Cantarella's prospective testimony that at the Long Island hotel shortly before Perrino's murder it was Vitale, not Cantarella, who had asked if Perrino was showing any signs of weakness and possibly cooperating, and, when Cantarella replied he was not, Vitale said he wanted to kill Perrino, which Cantarella understood

to mean that Vitale was concerned that Perrino would implicate Vitale.

Similarly, when Amato's counsel asked Vitale whether he had ever told Cantarella that it was Urso who was going to pick up Perrino at the pizzeria and walk him to the murder site, to which Vitale responded "I wouldn't have said that;" whether, on the day after Perrino was killed, Vitale had told Tartaglione that he should have been with Vitale the previous night and Vitale had to take Urso instead, to which Vitale responded: "I don't recall that. I don't believe that's true;" and whether he had told Tartaglione he was concerned Perrino would cooperate--because he was "becoming religious, going to church"--to which Vitale responded "I don't remember what I said to Mr. Tartaglione,"[3] it is difficult to imagine what more counsel could have asked.

The court did not find that Amato flat out failed to afford Vitale "an opportunity to deny or explain" the statements, *e.g. United States v. Schnapp*, 322 F.3d 564, 570 (8th Cir. 2003); but rather that it was "unclear" and presented a "closer question." (App *infra., 21A-22A*) The court's reasoning seems to be that Amato's counsel also asked Vitale about conversations he had with <u>other</u> Bonnano family

---

[3] "[S]tatements need not be diametrically opposed to be inconsistent." *United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir. 1988). If the witness "answers that he or she does not remember making the statement, counsel may resort to extrinsic proof as the next step." Weinstein's Federal Evidence § 613.05[3][a]. In any event, here the district court acknowledged that the prior statements at issue were inconsistent for purposes of Rule 613(b). (App. *infra.*, 19A)

members about the facts of the Perrino murder. Apparently it was the court's view that this somehow neutralized or diluted the questions asked Vitale about his statements to Cantarella and Tartaglione, because, according to the court, it was "unclear" whether Amato was impeaching Vitale based on extrinsic prior inconsistent statements or is "simply probing Vitale's recollection" to elicit contradictions in his testimony. (App. *infra.*, 21A-22A)

But the Rule only requires that the witness be given an "opportunity to explain or deny" the statement, not that it be labeled a "prior inconsistent statement" for him. Under the court's reasoning, a defendant who questions a witness closely about all the facts he testified to on direct examination risks losing the ability to introduce extrinsic evidence of prior inconsistent statements, even if the witness has denied them, because the denials do not stand out in sharp enough relief.

Moreover, most of the references to things said to or by the other seven Bonnano family members identified by the court were of a different nature than the confrontational questions that are the hallmark of the foundational type for introduction of prior inconsistent statements. The questions confronting Vitale with his prior statements to Cantarella or Tartaglione referred Vitale to very particular circumstances and began "Did you tell ...," "Did you ask ...," "Did you ever tell ...," or a variation of these. Nothing about the mention of things said to others during cross-examination of Vitale by Amato's counsel should excuse opposing counsel from recognizing foundational questions regarding prior inconsistent statements, especially when opposing counsel is already in possession of

those statements. Certainly the Government was, to use the language of Rule 613(b), "afforded an opportunity to interrogate the witness thereon."

Finally, even if the Government were asleep at the switch during Vitale's cross-examination, the Government, consistent with Rule 613(b), could have recalled him on its rebuttal case to further deny or explain Cantarella's and Tartaglione's testimony. *See United States v. Hudson*, 970 F.2d 948, 955 (1st Cir. 1992)(requirements of Rule 613(b) satisfied where federal prisoner witness was available for recall).

The court opined that calling cooperating witnesses like Cantarella and Tartaglione "would present a much greater logistical burden on the Government" than calling FBI agents (which co-defendant Basile proposed to do). (App *infra.*, 25A) The judge's concern might have some currency if it had been pressed by the Government--which never indicated it could not produce Cantarella and Tartaglione, quite the contrary--but seems beyond the interests that a disinterested judicial officer should be advancing. And the court never found that Vitale was not readily available to be recalled.

The court also cited to Rule 611(a) as supporting its ruling, stating that the rule gives the court "broad latitude" in deciding whether prior inconsistent statements should be admitted.[4] (App. *infra.*, 24A) The court counted against Amato that "the statements with which Amato seeks to impeach

---

[4] Rule 611(a) provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.

Vitale primarily implicate the collateral matters of Vitale's role, motive and interest in ordering Perrino's death." (App. *infra.*, 25A; emphasis added.) This was a complete mistake. A witness's motive and interest are not collateral matters. Weinstein's Federal Evidence § 613.05[1], *citing* Slough, *Impeachment of Witnesses: Common Law Principles and Modern Trends*, 34 Ind. L.J. 1, 18 (1958)("two classes of facts would be admissible independently of self contradiction: (1) facts relevant to matters at issue; (2) facts admissible to discredit the witness by showing motive, bias, interest, and any other similar matter likely to affect his testimony")(emphasis added). In any event, these were statements by Vitale indicating that he and not Amato wanted Perrino murdered for reasons having nothing to do with Amato. Nothing could be more material and less collateral.

It is true, as the court observed, that the court has discretion to admit or exclude extrinsic evidence of a prior inconsistent statement. (App. *infra.*, *18A*, *citing United States v. Schnapp*, 322 F.3d at 571, and *United States v. Young*, 248 F.3d 260, 268 (4th Cir. 2001).) But in *Schnapp*, the court exercised its discretion to exclude a statement because, unlike here, the witness had not been afforded an opportunity to deny or explain it. 322 F.2d at 572. And in *Young*, the court exercised its discretion to exclude the statement under Rule 403, because it was not "probative." 248 F.3d at 258. Here, the court necessarily abused its discretion because it erred in finding that Amato had not afforded Vitale an opportunity to deny or explain the statements; it erred in ruling that Amato was required, at the time Vitale was cross-examined, to notify the Government

of his intention to impeach Vitale by introducing his prior inconsistent statements through the testimony of Cantarella and Tartaglione; and it erred in concluding that evidence of Vitale's interest in the murder of Perrino was "collateral."

The exclusion of evidence violates the right to present a complete defense and denies the defendant a fair trial when the excluded evidence "creates a reasonable doubt that did not otherwise exist." *Jiminez v. Walker*, 458 F.3d 130, 146 (2d Cir. 2006), *citing United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

If the jury disbelieved Vitale, it is doubtful that Amato would have been convicted of the Perrino and DiFalco murders, and the jury may have questioned the Government's theory about Amato's role in the gambling operation.

If the jury concluded that Vitale had a personal interest in murdering Perrino, but lied about this interest in his testimony, the jury may well have accepted the theory of defense that Vitale had a strong personal motive for killing Perrino, namely, he feared Perrino would implicate him and his son Joel in the illegal activity at the Post and he had Perrino murdered by persons close to Vitale, whom he was protecting, not Amato.

Similarly, the jury would have doubted Vitale's testimony that he had heard that Amato killed DiFalco. This statement was critical to Amato's conviction. Vitale was the central trial witness against Amato and the verdict turned on whether he was to be credited or impeached.

The error in precluding Amato from calling Cantarella and Tartaglione to introduce Vitale's prior inconsistent statements was constitutional error, not only error in applying a rule of evidence. *See Crane v. Kentucky*, 476 U.S. 683, 687 (1986)("Constitution guarantees defendant 'a meaningful opportunity to present a complete defense'")(citation omitted); *Washington v. Texas*, 388 U.S. 14, 19 (1967)(fundamental element of due process is "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"); *Chambers v. Mississippi*, 410 U.S. 284.

Thus, "the more rigorous harmlessness test for constitutional errors" is applicable, *United States v. Tropeano*, 252 F.3d 653, 659 (2d Cir. 2001), namely, whether the Government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). Given the primacy and centrality of Vitale's testimony, the Government cannot possibly satisfy that burden.

The decision in *United States v. Wilson*, 490 F. Supp. 713 (E.D. Mich. 1980) is particularly instructive. As the Court in *Wilson* wrote, the concept of requiring that before extrinsic evidence to impeach by means of a prior inconsistent statement can be introduced, a foundation which requires that the witness be asked in advance (i.e. on cross-examination) whether he had made the allegedly inconsistent statement, originated with *Queen Caroline's Case*, 2 Brod. & Bing., 284, 319, 129 Eng. Rep. 976 (1820) (also referred to as the *Queen's Case*). *Wilson*, 490 F. Supp. at 719. Under the rule in *Queen Caroline's Case*, the witness had to be

confronted with specific foundational questions regarding when, where, and to whom the statement was made. *Id.* Similar to the view taken by the district court in Mr. Amato's case, in short, the cross-examination on the prior inconsistent statement had to be, in a sense, highlighted and very specifically detailed in order to constitute the requisite foundation which would later allow the introduction of extrinsic evidence of the prior inconsistent statement.

As the *Wilson* Court found, such a foundation no longer is required for several reasons. "Congress unequivocally abolished the stringent requirements of the *Queen's Case* from the Federal law of evidence when it promulgated Fed. R. Evid. 613(b)." *Wilson*, 490 F. Supp. at 719-20; 5-613 *Weinstein's Federal Evidence* Sec. 613 App.100.

The *Wilson* decision is instructive for an additional reason which highlights an error below: Rule 613(b)'s restrictions on the use of extrinsic evidence of prior inconsistent statements, does not even apply to admissions of a party-opponent as defined in Fed. R. Evid. 801(d)(2). Vitale testified as a co-conspirator under Rule 801(d)(2) and therefore Rule 613(b) had no application at all to the offering of extrinsic evidence of his prior inconsistent statements for, by definition, his prior inconsistent statements would come in as substantive evidence, not merely impeachment evidence, under Rule 801(d)(2) and for such prior inconsistent statements, Rule 613(b) does not apply, nor is there any need to establish the foundation under that rule. *Wilson*, 490 F. Supp. at 720.

As the Court found in *Wilson*, under such circumstances, the appropriate remedy would be to allow the Government to put on the extrinsic evidence of the prior inconsistent statement through its witness Ratliff, and then to permit Urbanski to be called on sur-rebuttal.

Ultimately, allowing the extrinsic evidence of prior inconsistent statements helps the jury reach "a better ascertainment of the truth." *Wilson*, 490 F. Supp. at 725.

The district court's exclusion of the critically important witnesses in Mr. Amato's case who would have testified that Vitale previously had expressed his personal motive for wanting to kill Mr. Perrino, prior statements which clearly were inconsistent with Vitale's testimony and, specifically with Vitale's denial on cross-examination of making any such statements, is especially confounding in light of a decision from the Second Circuit in *United States v. Harvey*, 547 F.2d 720 (2d Cir. 1976).

In *Harvey*, the defendant was charged with armed robbery and larceny. A Government witness, Mrs. Martin, testified at trial that she saw Harvey entering the bank he was accused at trial of robbing, at the time of the robbery. Martin testified that she had known Harvey for a number of years, had never had any arguments or disagreements with him, had never accused Harvey of fathering her child and, otherwise had no bias or prejudice against Harvey that would have led her to falsely inculpate him in the crime charged. *Harvey*, 547 F.2d at 722.

Following Martin's testimony, during which she specifically denied each of these facts, in response to questions on cross-examination, the defendant

Harvey sought to put on extrinsic evidence of prior inconsistent statements by Martin which would have shown her bias or prejudice against Harvey and which would have provided a motivation for giving false testimony against Harvey at trial. Specifically, Harvey sought to offer testimony from his wife who had encountered Martin while she (Mrs. Harvey) was on duty as a nurse in a hospital where Martin went for treatment of a broken leg. Mrs. Harvey would have testified that during that encounter, Martin had accused the defendant Harvey of fathering her child and refusing to support it and that when her husband (Mr. Martin) had learned about this he beat her and broke her leg, leading her to go to the hospital. *Harvey*, *Id.* The district court barred the admission of such extrinsic evidence of Martin's prior inconsistent statements under Rule 613(b) finding the same to be "collateral."

In reversing Harvey's conviction, the Second Circuit noted that extrinsic evidence that a witness has a motive to testify falsely is not a collateral issue and clearly is admissible. *Id.* Indeed, it found that the "law of evidence has long recognized" that a defendant must be permitted to adduce extrinsic evidence, "including the testimony of other witnesses," to prove facts which show bias in favor of or against a party. *Id.*, *citing* McCormick, *Evidence*, § 41 (2d Ed. 1972). As the Court noted, "special treatment is accorded evidence which is probative of a special motive to lie 'for if believed it colors every bit of testimony given by the witness whose motives are bared.'" *Id.* (quotation omitted)

The Court in *Harvey*, went on to note that, like many other Circuits, the Second Circuit requires that a "proper foundation must be laid before

extrinsic evidence of bias may be introduced," and that such foundation requires that a witness be "afforded an opportunity to explain or deny the prior inconsistent statement;" however, it held that Rule 613(b) "relaxes the traditional foundation requirement that a witness's attention on cross-examination be directed specifically to the time and place of the statement and the person to whom made." *Id.*, *citing inter alia* Advisory Comm. Notes, Fed. R. Evid. 613(b); McCormick, *Evidence*, § 37 n.45. In Mr. Amato's case, in contrast, while the district court conceded, as it had to, that Vitale's was specifically confronted with his prior inconsistent statements, and denied ever making the same, that foundation, nevertheless, was insufficient under Rule 613(b), nevertheless, because that area of cross-examination was not, somehow highlighted, or emphasized, and, instead, was simply a part of a longer cross-examination.

By so holding, the district court grafted an additional requirement onto Rule 613(b) which, not only is not required by the Rule, but is directly contrary to the Rule, the Advisory Committee Notes explaining the Rule's effect in actually relaxing the foundational requirements and is contrary to all cases construing the Rule.

The Court in *Harvey* expressly noted that Martin was asked about each of the prior inconsistent statements and, in each case, denied ever making them. This opportunity, alone, certainly was enough to obviate any surprise to the Government concerning the proffered extrinsic evidence of the prior inconsistent statements, notwithstanding the fact that defense counsel arguably could have been

"more expansive in establishing his foundation." *Harvey*, 547 F.2d at 723.

The Court in *Harvey* recognized that the right to introduce extrinsic evidence showing a witness's motive for lying about a defendant is not limitless and is subject to some level of discretion by the district court. *Id.* Mr. Amato does not take issue with that general principle; rather, he agrees with the *Harvey* Court and with its further statement that "it is rarely proper to cut off completely a probative inquiry that bears on a feasible defense." *Id.* It is especially important, as the Court in *Harvey* held, that a criminal defendant be given every opportunity to present facts which, if believed, could lead to the conclusion that a witness who testified for the government either favored the prosecution or was hostile to the defendant and to show the reasons establishing the same. *Id.* In the *Harvey* case, the proffered extrinsic evidence of prior inconsistent statements was offered to show Mrs. Martin's possible motivation for lying about Harvey – her anger toward him for refusing to support the child he had fathered with her, which led to a beating from her own husband.

In Mr. Amato's case, the proffered extrinsic evidence of Vitale's prior inconsistent statements was offered to show Vitale's direct personal interest in inculpating Mr. Amato in order to conceal his own (Vitale's) role in the Perrino murder and the role of his (Vitale's) close personal associates in the same. By pointing the finger at Mr. Amato, the defense theory argued, Mr. Vitale was protecting himself and his close associates from prosecution for the murder which he earlier had expressed a direct personal interest in carrying out, while denying the same at

trial. Surely, that was a most compelling circumstance which, especially after a foundation which included confronting Vitale with such prior inconsistent statements on cross-examination and his denial of the same, must have been permitted through the extrinsic evidence proffered by Mr. Amato, including the testimony of witnesses to those prior inconsistent statements by Vitale. The conviction in *Harvey* was reversed under much less compelling circumstances and the district court's decision in Mr. Amato's case cannot be reconciled with authority from the Second Circuit and all other authority from around the country on this principle or with the language of Rule 613(b) itself.

Virtually every other Circuit which has considered this question in one form or another is consistent with the decisions in *Harvey* and *Wilson* and sets forth its own formulation of the principle that Rule 613(b) was intended to relax the foundational requirements (all of which were fully met in Mr. Amato's case) and that Rule 613(b) actually favors the admission of extrinsic evidence of prior inconsistent statements under circumstances even less compelling than those present in Mr. Amato's case without any requirement that the foundation include a highlighting of the opportunity to explain or deny the statements or that it be dependent on specific advance notice to the witness or to the government of the identity of specific witnesses the defendant intended to call in its case-in-chief to present such extrinsic evidence of the witness's prior inconsistent statements. *See* e.g. *Wilmington Trust Company v. The Manufacturer's Life Insurance Company*, 749 F.2d 694, 699 (11th Cir. 1985) (Rule 613(b) does not specify any particular

time or sequence for giving the witness an opportunity to explain or deny or examine the prior inconsistent statements at issue; allowing extrinsic evidence testimony of the prior inconsistent statement before the witness was given an opportunity to explain or deny the prior inconsistent statement), *citing*, *United States v. Barrett*, 539 F.2d 244, 254-56 (1st Cir. 1976); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual at 430*, (3d ed. 1982); *United States v. Bibbs*, 564 F.2d 1165, 1169-70 (5th Cir. 1977); No. 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 613.(04) at 613-16 n. 6 (1981) (extrinsic evidence witness could testify about prior inconsistent statements even before declarant was given an opportunity to explain or deny the conversation at issue).

See also United States v. Young, 86 F.3d 944, 949 (9th Cir. 1996) (reversing conviction and finding that "the foundational prerequisites of Rule 613(b) require only that the witness be permitted - at some point - to explain or deny the prior inconsistent statement."; holding that even absent the declarant's denial of the statement on cross-examination extrinsic witness's later testimony about declarant's prior inconsistent statement would not have been barred. Declarant simply would have been given an opportunity to explain or deny on rebuttal); *United States v. Rose*, 403 F.3d 891, 903-904 (7th Cir. 2005) (failure to cross-examine declarant/witness on prior inconsistent statements did not preclude defense from eliciting extrinsic evidence testimony from another witness about the prior inconsistent statement; procedure simply was for government to bring declarant back to the stand on rebuttal to give him an opportunity to explain or deny the prior

inconsistent statements; finding error harmless because not direct or compelling evidence), *citing* 6th, 7th, 8th, 9th Circuits as being in accord with its understanding of Rule 613(b) application in not requiring cross-examination of the declarant/witness prior to the admission of extrinsic defense testimony concerning the prior inconsistent statements.

The lower court's misapplication of Rule 613(b) leaves Mr. Amato serving a life sentence for murders likely committed by a government witness who previously admitted the same. By denying Mr. Amato the ability to put evidence of such admissions before the jury, the court caused a great miscarriage of justice which this Court can and must correct.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

David I. Schoen
Counsel of Record
Attorney at Law
2800 Zelda Road
Suite 100-6
Montgomery, AL 36106
(334)395-6611

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

United States of America,
Appellee,

v.

BALDASSARE AMATO,
also known as Baldo,
STEPHEN LoCURTO,
also known as Stevie Blue,
Defendants-Appellants.

COUNSEL: Appearing for Appellants: Diarmuid White, White & White, New York, NY, for Baldassare Amato; Martin R. Stolar, New York, NY, for Stephen LoCurto.

Appearing for Appellee: Jeffrey A. Goldberg and John David Buretta, Assistant United States Attorneys for the Eastern District of New York (Benton J. Campbell, United States Attorney, and David C. James, Assistant United States Attorney, on the brief).

JUDGES: Present: ROSEMARY S. POOLER, PETER W. HALL, Circuit Judges, DAVID G. TRAGER, * .

* The Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

Entered: January 12, 2009

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

SUMMARY ORDER

Baldassare Amato appeals from a judgment of conviction entered November 3, 2006, for racketeering conspiracy in violation of 18 U.S.C. § 1962(d), engaging in an illegal gambling enterprise in violation of 18 U.S.C. § 1955, and conspiracy to engage in an illegal gambling enterprise in violation of 18 U.S.C. § 371. His co-defendant, Stephen LoCurto, appeals from a judgment of conviction entered February 23, 2007, for racketeering conspiracy. Both men were sentenced to life imprisonment. The charged criminal enterprise was the Bonanno organized crime family of La Cosa Nostra.

We assume the parties' familiarity with the facts, proceedings below, and specification of issues on appeal.

LoCurto

LoCurto first argues that the two predicate acts of narcotics trafficking with which he was charged were not sufficiently related to the charged enterprise. See United States v. Daidone, 471 F.3d 371, 375 (2d Cir. 2006) (per curiam) (describing vertical relatedness requirement, which may be satisfied by a showing that predicate acts are related to the activities of the enterprise). In this case, notwithstanding evidence that the Bonanno family

did not sanction or encourage narcotics trafficking or receive profits from it, other evidence indicated that (1) Bonanno family members frequently engaged in narcotics trafficking; (2) LoCurto's trafficking activities involved other family members including his supervisor in the organization; and (3) drug trafficking was a profitable activity for family members. From this proof, the jury could reasonably have found that the Bonanno family tacitly tolerated or encouraged narcotics trafficking activity because it supported family members and kept them available for the accomplishment of enterprise goals.

One of the predicate acts underlying LoCurto's racketeering conspiracy conviction was the May 1986 murder of Joseph Platia. LoCurto was acquitted of this murder in a New York state court trial. At his federal trial, LoCurto was not allowed to offer transcripts of the testimony of three of his state court witnesses who had since died. Two of these witnesses could offer a purportedly innocent reason for LoCurto's presence at the murder scene. The other witness was a medical expert who testified that if LoCurto had shot Platia, LoCurto would have had blood stains on his clothing. LoCurto argues that the exclusion of this evidence denied him due process. The testimony does not fall within an exception to the hearsay rule because LoCurto sought to use it against the United States, a party different from New York State, see Fed. R. Evid. 804(b)(1), and there is no proof that the United States effectively controlled the state prosecution, see United States v. Peterson, 100 F.3d 7, 12 (2d Cir. 1996). Evidentiary rules do not improperly infringe on a defendant's right to present a defense "so long as they are not arbitrary or disproportionate to the

purposes they are designed to serve." United States v. Scheffer, 523 U.S. 303, 308 (1998) (internal quotation marks omitted). Application of the general rule against hearsay was not arbitrary or disproportionate in this case for two reasons. First, one general purpose of the rule against hearsay is guarding against unreliable testimony that is not subject to cross-examination. At the state trial, the prosecution was not allowed to cross-examine the purported alibi witnesses on their Bonanno family connections, a subject that would have had considerable impeachment value in a racketeering conspiracy trial. Thus, the government would have been prejudiced by admission of the alibi witnesses' testimony. Second, it appears that the witnesses were only of marginal value to LoCurto. If the medical expert's testimony was sound, surely another medical expert could have been procured, and while the alibi witnesses may have been able to offer an innocent reason for LoCurto's presence at the murder scene, they could do nothing to explain the fact that he was captured near the scene with the murder weapon in his possession.

LoCurto also argues in a pro se brief that the district court erred by refusing to allow him to testify concerning his prior trial and acquittal. There was no error in precluding proof of the acquittal. See United States v. Viserto, 596 F.2d 531, 537 (2d Cir. 1979). Further, the district court's instruction that LoCurto refer to testimony in a prior proceeding rather than in a prior trial did not prejudice LoCurto in any way.

To the extent LoCurto argues that he was denied due process by the government's lengthy delay in indicting him, his argument fails because he has

failed to demonstrate that (1) the delay was a result of government strategy, or (2) he incurred sufficiently severe prejudice. See United States v. Marion, 404 U.S. 307, 324-25 (1971).

In 1986, the year in which LoCurto murdered Platia, the maximum penalty for a racketeering conspiracy conviction was twenty years' imprisonment. After the murder but before the narcotics trafficking predicate acts, the statute was amended to provide a maximum sentence of life imprisonment where any of the predicate acts underlying the conviction carried a life sentence. See 18 U.S.C. § 1963(a). Because the only act making LoCurto eligible for a life sentence was the 1986 murder, LoCurto argues that his sentence violates the Ex Post Facto Clause. We reject this argument because LoCurto continued to act in the conspiracy after the effective date of the challenged amendment. See United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992). That is, LoCurto was on notice of the enhanced penalties as of the change in the law, yet he continued as a participant in the racketeering conspiracy.

Next, LoCurto claims ineffective assistance of counsel. In his counseled brief, he challenges trial counsel's decision to call a medical expert who testified for the prosecution in the state trial as well as trial counsel's failure to obtain and offer LoCurto's tax returns. We agree with the district court that the overwhelming evidence against LoCurto precludes him from showing prejudice as required in an ineffective assistance of counsel claim. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In his pro se brief, LoCurto contends that the court should have relieved his counsel based on

complaints he made to the court. We review the district court's action on a motion to relieve counsel for abuse of discretion. United States v. Doe, 272 F.3d 116, 122-23 (2d Cir. 2001). The factors to be considered are:

> (1) whether defendant made a timely motion requesting new counsel; (2) whether the trial court adequately inquired into the matter; . . . (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense; [and(4)] whether the defendant substantially and unjustifiably contributed to the breakdown in communication.

Id. (internal quotation marks omitted). LoCurto did not actually ask for new counsel until July 5, 2006, after the defense had rested. Therefore, his request was not timely. Further, although Judge Garaufis did not appoint new counsel for summations, he did appoint new counsel for sentencing. LoCurto's earlier communications concerning his then attorney did not request that the attorney be relieved. On March 14, 2006, he wrote to the court complaining of long gaps between visits and communications by his then attorney. However, he also said that he had been helped a great deal by an attorney covering for Batchelder. The letter neither requested that LoCurto's then attorney be relieved or set forth an adequate basis for relieving him. On June 29, 2006, LoCurto again wrote to the court. This time he complained that defense counsel had called the state's medical expert from the prior trial over LoCurto's objection and asked that, in the interest of fair play, the court admit the testimony of LoCurto's state court expert. The district court read LoCurto's letter into the record, and then defense counsel explained his tactical reasons for calling the state prosecution's medical expert as his witness. The district court then reiterated its ruling that LoCurto would not be able to introduce a transcript of his state court expert's testimony. Based on these circumstances, we find no abuse of discretion in the state court's rulings.

Finally, LoCurto argues that the district court committed plain error by singling him out as an interested witness who had a motive to lie. At the time that the district court gave its charge, such instructions were appropriate under the law of this circuit. See United States v.Tolkow, 532 F.2d 853,

859 & n.3 (2d Cir. 1976). However, we subsequently overruled Tolkow and held that "it is error to instruct the jury that a defendant's interest in the outcome of the case creates a motive to testify falsely." United States v. Brutus, 505 F.3d 80, 87 (2d Cir. 2007). LoCurto concedes that he did not object to the charge at trial and that his claim can be reviewed only for plain error. See Fed. R. Crim. P. 52(b). Even if the defendant demonstrates an error that is plain, we will reverse only if the error affected substantial rights and "the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." United States v. Bruno, 383 F.3d 65, 78 (2d Cir. 2004) (internal quotation marks omitted). Because LoCurto's testimony that he was not a member of the Bonanno family and that he just happened on the Platia murder scene and picked up the murder weapon was inherently incredible, we do not believe that the district court's charge prejudiced LoCurto or that it reflected adversely on the fairness, integrity or public reputation of judicial proceedings.

We therefore affirm LoCurto's conviction and his sentence.

Amato.

Amato's contention that the court should have (1) charged the jury that it was to be anonymous and partially sequestered because there was a concern that organized crime figures might harm them and (2) asked questions designed to elicit any fears that the jury might have after being so instructed lacks merit. We previously have approved an instruction in an organized crime family case that was very similar to the one Judge Garaufis actually gave on

this issue. See United States v. Locascio, 6 F.3d 924, 946-47 (2d Cir. 1993). In addition, **Amato** has not shown that the district court abused its broad discretion in deciding whether to ask questions that he suggested. See United States v. Kyles, 40 F.3d 519, 524 (2d Cir. 1994).

We have reviewed Amato's claims concerning various evidentiary rulings and find no abuse of discretion or denial of due process.

Amato asks that we review a sealed submission that the district court reviewed immediately prior to the testimony of Anthony Tabbita to determine whether it is properly viewed as Brady or Giglio material. See Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972). Having reviewed both the material reviewed by the district court and the materials underlying the submission to the district court, we agree with the district court that there was no reasonable probability that the materials underlying the sealed submission would have affected the outcome of the trial. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995)(per curiam). Therefore, there was no error in the district court's ruling. We caution, however, that it would have been better practice for the government to have submitted for review the underlying materials rather than its summary of those materials.

Next, **Amato** objects to the district court's refusal to charge that with respect to the racketeering conspiracy, the "defendant must have agreed that at least one of these racketeering acts would be committed after January 20, 1999." There was no error because the requested charge was legally incorrect. "A [racketeering] conspiracy . . . is

presumed to exist until there has been an affirmative showing that it has been terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." Bruno, 383 F.3d at 81 n.10 (internal quotation marks and brackets omitted).

Finally, in his rebuttal summation, the Assistant United States Attorney inaccurately claimed that a co-conspirator was incarcerated with **Amato**. Despite objection, the jury was not charged that this claim was a misstatement although the court did instruct the jury that arguments were not evidence. The government did not repeat its claim and turned to another line of argument. Because the misstatement was an aberration and the court took curative measures, reversal is not merited. See United States v. Melendez, 57 F.3d 238, 241-42 (2d Cir. 1995).

We, therefore, affirm Amato's conviction.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

BALDASSARE AMATO, et al.,
Defendants.

Entered: June 27, 2006

MEMORANDUM & ORDER
03-CR-I382 (NGG)

GARAUFIS, United States District Judge.

On June 24, 2006, the Government moved to prevent the defense from calling witnesses to elicit prior inconsistent statements made by Government witnesses pursuant to Fed. R. Evid. 613(b). (Gov't Ltr. Br., dated June 24, 2006 ("Gov't Ltr. Br.").) Defendant Baldassare Amato ("Amato") intends to call Richard Cantarella, Frank Coppa, and James Tartaglione to impeach the testimony of cooperating witness Salvatore Vitale ("Vitale") (Amato Ltr., dated June 25, 2006 ("Amato Ltr."), at 2) [1] and defendant Anthony Basile ("Basile") seeks to call Federal Bureau of Investigation ("FBI") agents

---

[1] Amato also intends to call Duane Leisenheimer, but not for the purposes of eliciting a prior inconsistent statement. (Amato Ltr., dated June 25, 2006, at 2 & n.1.)

Greg Massa and Joseph Bonavolonta to impeach the testimony of cooperating witness Joseph D'Amico ("D'Amico"). (Basile Ltr., dated June 25, 2006 ("Basile Ltr."), at 4.) The Government objects to the production of these witnesses on the ground that the defendants intend to call them solely to elicit inadmissible hearsay, because the alleged statements are not inconsistent with D'Amico's and Vitale's trial testimony, Amato and Basile failed to afford D'Amico and Vitale with the opportunity to deny or explain the inconsistent statements, and Amato and Basile gave no notice of their intention to introduce extrinsic evidence during the testimony of Vitale and D'Amico. (Gov't Ltr. Br., at 3-4.) For the reasons set forth below, the Government's motion is GRANTED with respect to Amato and DENIED with respect to Basile.

I. FACTUAL BACKGROUND

At issue are allegedly prior inconsistent statements made by Government cooperating witnesses who testified in this trial regarding the alleged murder of Robert Perrino ("Perrino"). The Government alleges that Amato and Basile murdered Perrino in the furtherance of the Bonanno organized crime family. (Indictment 25-27.) On June 5, 2006, during the cross examination by Diarrnuid White, Amato's counsel, of Salvatore Vitale, a cooperating witness for the Government, Amato's counsel had the following colloquy with Vitale:

> Q: Do you recall a meeting at a Hilton Hotel in Long Island just shortly before Perrino was killed?
>
> A: I used to meet Richie [Cantarella] there.

Q: And did you ask him at that meeting whether Bobby Perrino was showing any signs of weakness?

A: No, I didn't have to. He volunteered that.

Q: Did he tell you in his opinion that Robert Perrino wasn't showing any signs of weakness?

A: He never said that.

Q: Did you tell Richie Cantarella that you wanted to kill Robert Perrino?

A: No. I says to Richie if he had a location in the city, and he knew what I meant by that. After he described the situation - after I discussed it with Spero.

Q: In he had a location -

A: If he had a location in the city where we could kill Bobby [Perrino]. But you're going into like third, fourth, fifth conversation. It wasn't all done in one conversation.

Q: You were not the one who suggested to him that Perrino be killed?

A: No. He suggested it to me. And Al Walker was suggesting it to Anthony Spero.

Q: Did you ever have that conversation with James Tartaglione where you said you were concerned that Robert PelTino would be cooperating, would cooperate because he was becoming religious, going to church, might become a priest, those type of things?

A: From my firsthand knowledge or from what I was told from another individual.

Q: From what you said to Mr. Tartaglione. Did you say that to Mr. Tartaglione?

A: I don't remember what I said to Mr. Tartaglione.

(Transcript of the Trial Proceedings ("Tr."), at 538 39.) Later in the cross-examination, White had the following exchange with Vitale:

Q: Did you ever tell Richard Cantarella that Anthony Urso was going to pick up Perrino?

A: Not at all, sir.

Q: Pick up Perrino and bring him to the murder scene?

A: I don't recall saying that.

Q: Do you know if you said it or not, or you just don't recall if you said it?

A: I wouldn't have said that.

Q: The day after the Perrino murder, did you tell James Tartaglione, Big Louie, that he should have been with you the prior night when you bad to take Anthony Urso instead?

A: I don't recall that. I don't believe that it's true.

(Tr. at 558-59.)

On June 7, 2006, after cooperating witness Joseph D'Amico testified that Robert Lino told him that he (Lino) murdered Perrino, and that Perrino was murdered in a bar owned by Basile, Gail Laser, Basile's counsel, cross-examined D'Amico regarding his conversation with FBI agents, whose notes ("302's") indicate that D'Amico told them that Robert

Trimaldi killed Perrino, and that Basile shot Perrino. The following exchange occurred:

Q: Do you recall that you talked to the agents on or around January 21, 2003?

A: Yes.

Q: Do you recall that in 2003, three-and-a-half years ... earlier than today, you told the agents that Robert Trimaldi had told you that he had killed Perrino with an icepick. Do you remember that?

A: I don't remember that, ma'am.

Q: You don't remember that?

A: No.

Q: Let me show you something - something that may refresh your recollection....do you recall, now that you have looked at this document, do you recall that in January 2003, soon after you began cooperating, that you in fact told federal agents that it was Robert Trimaldi who confessed that he killed Perrino by stabbing him with an icepick in his ear? Do you remember that?

A: I don't remember telling him that.

Q: You don't remember telling him that?

A: They must have wrote it wrong.

Q: They wrote it wrong?

A: Yes.

Q: Do you also remember in that same conversation telling the agents that it was Anthony Basile who shot Mr. Perrino? Do you remember telling them that?

A: Never told them that.

Q: You never told them that?

A: No.

Q: Do you also recall telling the agents that Robeli Perrino was sent to an apartment to be killed? Do you recall telling them that?

A: No.

Q: You don't recall that?

A: No.

Q: Can I show you something that will refresh your recollection?

A: I never told them that.

Q: You never told them that?

A: No.

(Tr. at 1103-5.) Counsel for Amato and Basile did not provide any other indication during their examinations that they intended to introduce prior inconsistent statements against Vitale and D'Amico, and the Government did not attempt to rehabilitate these witnesses on redirect with respect to these allegedly inconsistent prior statements.

II. DISCUSSION

> The prior statement exception to the hearsay rule is set forth in Rule 613(b), which states:
>
> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Fed. R. Evid. 613(b). Thus, "A witness's prior statement may be offered to impeach that witness's credibility if (1) the statement is inconsistent with the witness's trial testimony, (2) the witness is afforded an opportunity to deny or explain the same, and (3) the opposing party is afforded the opportunity to []examine the witness thereon." United States v, Strother, 49 F.3d 869, 874 (2d Cir. 1995).

Rule 613(b) operates in the context of the trial court's power to regulate its courtroom pursuant to Rule 61 I (a), which provides that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611 (a). Thus, the procedure for introducing prior inconsistent statements described in Rule 613(b) "'is not mandatory, but is optional at

the trial judge's discretion.'" United States v. Schnapp, 322 F.3d 564,571 (8th Cir. 2003) (quoting United States v. Sutton, 41 F.3d 1257, 1260 (8th Cir. 1994)). Even if all the foundational elements of Rule 613 are met, a district court is not unequivocally bound to admit any or all extrinsic evidence of a prior inconsistent statement. Rather, a district court may still exercise its discretion to exclude such evidence," United States v. Young, 248 F.3d 260, 268 (4th Cir. 2001).

Before proceeding to analyze the instant motion under Rules 611 (a) and 613(b), I first note that Basile's argument that the Government's numerous representations that it would produce all available witnesses upon defense counsel's request precludes the Government from making the instant motion (Basile Ltr., at 1), is without merit. The question is not whether defendants are entitled *to call* witnesses, but rather *what testimony* this Court shall permit defendants to elicit. The Government's representation that it shall produce all timely requested persons in its control has no bearing on whether the testimony that Amato and Basile seek to elicit from these persons constitutes inadmissible hearsay.

A. Inconsistent Statement

Regarding the Government's first argument that the statements are not inconsistent, Amato has stated that he seeks to call Cantarella to elicit testimony that Salvatore Vitale said that Robert Perrino "was 'weak' and might cooperate, thereby indicating Perrino must be killed," and that "Anthony Urso was going to pick up Perrino at the pizzeria and walk him to the murder site, and from

Tartaglione that Vitale was personally concerned about PelTino's cooperation, and that Tartaglione was not available to perform the job Vitale ultimately assigned to Urso in the Perrino killing. (Amato Ur., at 2.) Basile contends that 302's created by agents Massa and Bonavolonta indicate that D'Amico told them (a) Trimaldi (and not Lino) killed Perrino with an ice pick; (b) Basile shot Perrino; and (c) Perrino was sent to an apartment to be killed. (Basile Ur. Br., at 3-4.)

I have no trouble finding that the statements with which Amato and Basile seek to impeach Vitale and D'Amico are inconsistent. The "statements need not be diametrically opposed to be inconsistent." United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988)(quotations omitted). As these statements tend to prove that Vitale and D'Amico stated that the Perrino murder occurred in a different manner for different reasons than their trial testimony indicated, these statements are inconsistent under Rule 613(b). See id. (holding that "the determination of whether statements are in fact inconsistent [under Rule 613] is committed to the sound discretion of the district court").

B. Witness's Opportunity To Deny Or Explain

Next, the Government argues that Amato and Basile failed to confront D' Amico and Vitale with the allegedly inconsistent statements, and that this line of questioning should therefore be precluded. Basile contends that his counsel's attempts to refresh D'Amico's recollection with the 302's afforded him with the opportunity to deny the prior inconsistent statement(s). (Basile Ur. Br., at 4.) Amato's counsel urged during argument of this

motion that he "set up" the use of inconsistent prior statements in his cross-examination of Vitale. (Tr. At ___.)

Rule 613(b) requires that the proponent of the prior inconsistent statement provide the witness with an opportunity to explain the a prior inconsistent statement. Fed. R. Evid. 613(b); see Manley v. AmBase Corp., 337 F.3d 237, 246-48 (2d Cir. 2003); United States v. Sutton, 41 F.3d 1257, 1260 (8th Cir. 1994), celio denied, 514 U.S. 1072, 131 L. Ed. 2d 572,115 S. Ct. 1712 (1995) (affirming trial judge's bar on admission of prior inconsistent statement "because [the witness] was not given the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand, which is normally the proper foundation for impeachment under Fed. R. Evid. 613(b)"); United States v. Betts, 16 F.3d 748,764 (7th Cir. 1994). Where a statement has not been drawn to the witness's attention during his or her testimony, a district court may properly preclude Rule 613 prior inconsistent testimony, even though the witness could have been recalled to explain or deny the statement. United States v. Schnapp, 322 F.3d 564,570 (8th Cir. 2003); but see United States v. Hudson, 970 F.2d 948,954-55 (First Circuit does not require party offering statement under Rule 613(b) to afford witness the opportunity to explain or deny statement before seeking to admit it, because opponent can recall witness.).

I find that Basile sufficiently confronted D'Amico with the alleged inconsistent statement. Basile's counsel confronted D'Amico with the FBI agents' notes, and repeatedly asked D'Amico about purported statements that the 302's suggest that he

made. Further, D'Amico denied making these statements, and, after examining the notes, testified that the statements are incorrect reflections of his statements. As the 302's themselves are not admissible as prior inconsistent statements under Rule 613(b) because the 302's are not verbatim transcripts and D'Amico did not endorse them, see United States v. Almonte, 956 F.2d 27, 29 (2d Cir. 1992), Basile in using the 302's to refresh D'Amico's recollection of the meeting made maximal use of the agents' notes on cross-examination. I therefore find that Basile provided D'Amico with ample opportunity to deny or explain the alleged prior inconsistent statement.

In contrast, I find that Amato's cross-examination of Vitale presents a much closer question of whether Vitale was provided with sufficient opportunity to explain or deny his statements. The exchanges between Amato's counsel and Vitale quoted in this Memorandum and Order are embedded within a lengthy examination of Vitale's conversations with other alleged members of the Bonanno organized crime family regarding the alleged Perrino homicide.[2] It is thus unclear from the entire cross-examination whether Amato is impeaching Vitale based on extrinsic evidence of inconsistent statements, or simply probing Vitale's recollection of

---

[2] Amato's counsel during this cross-examination also asked Vitale about conversations that he had with Spero (Tr. at 538-40,543, 545, 550), Al Walker WL at 538), George Sciascia (id. at 540), Frank Lino WL at 543-46, 551-53, 556), Michael Cardello WL at 547-50,552,555), Robert Lino, Jr. WL at 551, 553, 557), and Duane Leisenheimer WL at 557) regarding the alleged Perrino homicide.

the events in question to elicit contradictions in Vitale's testimony. Furthermore, Amato's counsel never confronted Vitale with the purported evidence of the inconsistent statement(s). Given the lengthy examination of Vitale's memory of conversations that he may have had with other alleged members of the Bonanno organized crime family regarding the alleged Perrino homicide, and lacking any questions that put Vitale on notice of the existence of extrinsic evidence of a prior inconsistent statement, this court is constrained to conclude that Amato did not provide Vitale with sufficient opportunity to explain or deny the prior inconsistent statement.

C. Government's Opportunity To Examine The Witness

The Government further argues that this court should preclude these witnesses because defense counsel failed to "inform the court and opposing counsel, at the time the witness testifie[d], of the intention to introduce" impeaching extrinsic evidence. (Gov't Ltr., at 3 (quoting Weinstein's Federal Evidence § 613.05(5) at 613-28 (alterations omitted and supplied)).)

The Second Circuit is silent on the proper procedures for the proponent to place the court and the opposing party on notice of the impeachment of a witness through the use of a prior inconsistent statement.[3] Other circuits have held that Rule 613

---

[3] The parties have brought to this court's attention the unpublished Second Circuit case of United States v. Surdow, No. 04-2459-Cr., 2005 U.S. App. LEXIS 2156 (2d Cir. Feb. 9, 2005). While this decision provides an otherwise useful Rule 613(b) analysis, as this is an unpublished decision, it has no precedential value and is not specifically relied upon in this decision

does not mandate specific procedures in order for a trial court to admit prior inconsistent statements. See, e.g., Schnapp. 322 F.3d at 571 (Rule 613(b) "on its face, does not require that the witness be cross-examined about the alleged prior inconsistent statement *before* that statement may be presented as impeachment evidence," and advisory committee notes explain that no specific time or sequence is required.). Nevertheless, it is equally clear that a trial court has the discretion to bar a statement for failure to comport with the procedures set forth in Rule 613. See id.; Sutton, 41 F.3d at 1260; cf. Harris v. Barkley, 202 F.3d 169, 174 (2d Cir. 2000)(finding that district courts have the discretion to limit witnesses that would result in a trial delay in the court's interest in regulating its courtroom).

Judge Weinstein has set forth the prevailing practice in admitting Rule 613 prior inconsistent statements in his widely respected evidence treatise. When an impeaching party does not confront a witness with the specifics of a prior inconsistent statement, the party should "inform[] the court and opposing counsel, at the time the witness testifies, of the intention to introduce" the extrinsic evidence to alert the court and opposing party to the potential need to "keep the witness available to be called to explain the statement." Weinstein's Federal Evidence § 613.05(5), at 613-28. This practical rule is intended to provide the court with reasonably assurance of orderly conduct at trial, and I shall adhere to it.

As I have found that defendant Basile provided D'Amico with an opportunity to explain or deny his prior inconsistent statement suggested in the impeaching extrinsic evidence, Basile's counsel was

not required to further alert the court and the Government as to Basile's intention to call the FBI agents who authored the 302's. However, as I find that Amato did not afford Vitale with sufficient opportunity to explain or deny the alleged prior inconsistent statements, I must now determine whether Amato sufficiently notified this court or the Government of his intention to call Cantarella, Coppa, and Tartaglione in order to elicit Vitale's alleged prior inconsistent statements under Rule 613(b).

The record reflects that Amato, at the time of his cross-examination of Vitale, did not put this court or the Government on notice of his intention to call Cantarella, Coppa, or Tartaglione in his direct case in order to admit Vitale's hearsay statements as prior inconsistent statements. As stated supra, Amato in his cross-examination of Vitale referred to numerous conversations with many different alleged members of the Bonanno organized crime family regarding the alleged Perrino homicide. While I am sympathetic to the explanation of Amato's counsel that he thought that the Government would call Cantarella, Coppa, and Tartaglione in its case-in-chief, Amato should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione. Having failed to do so, I find that he did not provide this court or the Government with sufficient notice under Rule 613(b).

D. Other Considerations Under Rule 611(a)

Given that this court has broad latitude in deciding whether prior inconsistent statements

should be admitted under Rule 613, I take this opportunity to summarize the relative merits of the statements sought by Amato and Basile under Rule 611 (a). The statements sought by Basile are considerably more material and reliable than those offered by Amato. The statements D'Amico allegedly made to the FBI officials are highly probative of D'Amico's recollection of the Perrino homicide and Basile's alleged role in the scheme, and the 302'8 are reliable documents with which to examine the FBI officials. In contrast, the statements with which Amato seeks to impeach Vitale primarily implicate the collateral matters of Vitale's role, motive and interest in ordering Perrino's death, and lack any contemporaneous recorded recollection. Lastly, calling Cantarella, Coppa, and Tartaglione would present a much greater logistical burden on the Government than the FBI agents. Even if the FBI agents' testimony caused the Government to call D'Amico in its rebuttal case, this is a relatively minor inconvenience and is not likely to delay the trial.

III. CONCLUSION

Accordingly, I find that the prior inconsistent statements sought by Basile are admissible pursuant to Rules 611(a) and 613(b), because they are inconsistent, D'Amico was afforded the opportunity to deny or explain them, and Basile's counsel provided the Government and this court with sufficient notice that she intended to seek to admit the statements. Moreover, I find the extrinsic evidence of prior inconsistent statements to be material and reliable, and the potential prejudice to the Government in recalling D'Amico to be relatively minor. However, the prior inconsistent statements

that Amato seeks to introduce are not admissible under Rules 611(a) and 613(b), despite the fact that they are inconsistent, because Vitale was not provided sufficient opportunity to deny or explain them, the Government and this court were not afforded sufficient notice of Amato's intent to admit these prior inconsistent statements, and allowing

Amato to call these witnesses would substantially burden the Government and sacrifice the orderly conduct of this trial. I therefore partially grant and partially deny the Government's motion, with the caveat that this ruling is "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the ... proffer." Luce v. United States, 469 U.S. 38, 41 (1984).

The Government's motion to preclude the introduction of prior inconsistent statements by Amato is GRANTED, and the Government's motion to preclude the introduction of prior inconsistent statements by Basile is DENIED.

SO ORDERED.

Dated: June 27, 2006

Brooklyn, N.Y.

/s/

Nicholas G. Garaufis
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of April, two thousand nine,

---

United States of America,
Appellee,

v.

BALDASSARE AMATO,
also known as Baldo,
STEPHEN LoCURTO,
also known as Stevie Blue,
Defendants-Appellants.

Entered: April 27, 2009

ORDER
Docket Number: 06-5117-(L)
07-0712(con)

Appellant Stephen LoCurto having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel

rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk

JAN 15 2010

No. 09-375

In the Supreme Court of the United States

BALDASSARE AMATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
KIRBY A. HELLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in excluding extrinsic evidence of a witness's prior inconsistent statements.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 14
Jimenez v. *Walker*, 458 F.3d 130 (2d Cir. 2006), cert. denied, 549 U.S. 1133 (2007) 14
State v. *Danforth*, 956 A.2d 554 (Vt. 2008) 11
United States v. *Barile*, 286 F.3d 749 (4th Cir. 2002) 8
United States v. *Barrett*, 539 F.2d 244 (1st Cir. 1976) 9, 11
United States v. *Bibbs*, 564 F.2d 1165 (5th Cir. 1977), cert. denied, 435 U.S. 1007 (1978) 7, 12
United States v. *Bonnett*, 877 F.2d 1450 (10th Cir. 1989) 7
United States v. *Hames*, 185 Fed. Appx. 318 (5th Cir. 2006) 8, 12
United States v. *Harvey*, 547 F.2d 720 (2d Cir. 1976) 13
United States v. *Hudson*, 970 F.2d 948 (1st Cir. 1992) 11
United States v. *Marks*, 816 F.2d 1207 (7th Cir. 1987) 9
United States v. *Moore*, 149 F.3d 773 (8th Cir.), cert. denied, 525 U.S. 1030 (1998), and 525 U.S. 1082 (1999) 7, 12
United States v. *Schnapp*, 322 F.3d 564 (8th Cir. 2003) 7, 9, 12

Cases—Continued: Page

United States v. *Soundingsides*, 825 F.2d 1468 (10th Cir. 1987) 8
United States v. *Speece*, No. 92-3077, 1993 WL 17105 (10th Cir. Jan. 26, 1993) 12
United States v. *Surdow*, 121 Fed. Appx. 898 (2d Cir. 2005) 9, 12
United States v. *Young*, 248 F.3d 260 (4th Cir.), cert. denied, 533 U.S. 961 (2001) 8
Wammock v. *Celotex Corp.*, 793 F.2d 1518 (11th Cir. 1986) 9

Constitution, statutes and rules:

U.S. Const.:
Amend. V 6
Amend. VI 6
18 U.S.C. 371 2
18 U.S.C. 1955 2
18 U.S.C. 1962(d) 2
Fed. R. Evid.:
Rule 611(a) 5, 8, 10, 11
Rule 613 9
Proposed Rule advisory committee's note (1972) ... 7
Rule 613(b) ..... *passim*
Rule 801(d)(1) 7
Rule 801(d)(2)(E) 12
Supt. Ct. R. 14(1)(a) 12

Miscellaneous: Page

4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* (Joseph M. McLaughlin ed., 2d ed.):

2004 9

Oct. 2004 5

Feb. 2008 8

Feb. 2008 & Feb. 2009 7

Feb. 2009 7

Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 10

In the Supreme Court of the United States

No. 09-375

BALDASSARE AMATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not reported in the Federal Reporter but is available at 306 Fed. Appx. 630. The opinion of the district court (Pet. App. 11A-26A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. A petition for rehearing was denied on April 27, 2009 (Pet. App. 27A-28A). On July 21, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); engaging in an illegal gambling business, in violation of 18 U.S.C. 1955; and conspiring to engage in an illegal gambling business, in violation of 18 U.S.C. 371. He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. 1A-10A.

1. Petitioner was a soldier and "made" member in the Bonanno organized crime family of La Cosa Nostra for at least 30 years. He participated in the crime family's illegal gambling business, controlling "Joker-Poker" machines and a seasonal baccarat card game. Gov't C.A. Br. 5-7, 10-11.

Petitioner also was responsible for two murders. On May 4, 1992, petitioner murdered Robert Perrino at the behest of Bonanno family underboss Salvatore Vitale. Perrino was the superintendent of deliveries at the New York Post and a Bonanno associate. The Bonanno family feared Perrino would cooperate with police in an investigation of the family's corrupt influence at the paper, and decided to order his killing. Vitale first asked a Bonanno captain to find shooters from Canada to kill Perrino. The captain was unable to do so, but suggested to Vitale in petitioner's presence that Vitale use petitioner to accomplish the murder. Petitioner readily agreed. Petitioner was later observed at the murder scene by one of the Bonanno associates assigned to dispose of Perrino's body. Gov't C.A. Br. 15-18.

Petitioner also ordered the murder of Sebastiano DiFalco. Petitioner and DiFalco had a financial dispute related to a restaurant called Giannini. After several

failed attempts, petitioner's order was carried out by others in February 1992. Gov't C.A. Br. 11-15.

2. At trial, Vitale testified for the government and discussed petitioner's role in the Perrino and DiFalco murders. Vitale admitted that he and Bonanno consiglieri Anthony Spero decided that Perrino should be killed because, based on information they received from Bonanno associate Richard Cantarella and others, they feared that Perrino would "spill the beans" about the Bonanno crime family's illegal activities. Pet. C.A. App. 131. Vitale described the plans for the murder that he and Spero developed. *Id.* at 131-134; Gov't C.A. Br. 16. During cross-examination, petitioner's counsel questioned Vitale about his meetings with Cantarella and their discussions about killing Perrino. Vitale testified that Cantarella "volunteered" that Perrino was showing signs of weakness. Pet. C.A. App. 147. Vitale also testified that it was Cantarella, rather than Vitale, who suggested Perrino's killing. *Ibid.* Vitale denied having a "personal interest" in having Perrino killed. *Id.* at 148. With respect to the DiFalco murder, Vitale testified that he had learned from Bonanno boss Joseph Massino that petitioner killed DiFalco because petitioner believed that DiFalco was stealing money from the Giannini restaurant. Gov't C.A. Br. 12-13.

About three weeks after Vitale completed his testimony, petitioner first informed the government and the district court that he intended to call Cantarella and others to impeach Vitale's testimony with prior inconsistent statements. Gov't C.A. Br. 31-32. According to petitioner, Cantarella would testify that Vitale told him that Perrino "was 'weak' and might cooperate, thereby indicating Perrino must be killed—which Cantarella

believed reflected Vitale's own personal concerns should Perrino cooperate." Pet. C.A. App. 105.

The government moved to exclude this testimony under Federal Rule of Evidence 613(b). Pet. App. 11A. Rule 613(b) provides in relevant part that, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." The district court granted the government's motion and excluded the evidence. Pet. App. 11A-26A.

The court first concluded that petitioner's cross-examination of Vitale did not satisfy Rule 613(b)'s requirement that the witness be given an opportunity to explain or deny the statement. Although petitioner asked Vitale some questions about his conversations with Cantarella, Pet. App. 12A-14A, the court found that these "exchanges * * * [were] embedded within a lengthy examination of Vitale's conversations with other alleged members of the Bonanno * * * family" about the Perrino murder and that it was "unclear from the entire cross-examination whether [petitioner] [was] impeaching Vitale based on extrinsic evidence of inconsistent statements, or simply probing Vitale's recollection of the events in question to elicit contradictions in Vitale's testimony," *id.* at 21A-22A. It also found that "[petitioner's] counsel neither confronted Vitale with the purported evidence of the inconsistent statements," nor asked any "questions that put Vitale on notice of the extrinsic evidence of a prior inconsistent statement." *Id.* at 22A. Given these considerations, the court found that petitioner "did not provide Vitale with sufficient oppor-

tunity to explain or deny the prior inconsistent statement." *Ibid.*

The court next decided to adhere to "the prevailing practice" set forth in Judge Weinstein's "widely respected evidence treatise" to determine whether petitioner properly placed the government and the court on notice of his intent to impeach Vitale under Rule 613(b). Pet. App. 23A. Under that approach, "[w]hen an impeaching party does not confront a witness with the specifics of a prior inconsistent statement, the party should 'inform[] the court and opposing counsel, at the time the witness testifies, of the intention to introduce' the extrinsic evidence to alert the court and opposing party to the potential need to 'keep the witness available to be called to explain the statement.'" *Ibid.* (second set of brackets in original) (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 613.05[5], at 613-28 (Joseph M. McLaughlin ed., 2d ed. Oct. 2004) (*Weinstein*)). Applying that rule, the court concluded that petitioner "did not provide this court or the Government with sufficient notice under Rule 613(b)." *Id.* at 24A.

Finally, the court considered other factors that informed the exercise of its discretion. Referring to its authority to control the order of witnesses and presentation of evidence under Federal Rule of Evidence 611(a), the court noted that the statements that petitioner wished to admit "primarily implicate[d] the collateral matters of Vitale's role, motive and interest in ordering Perrino's death." Pet. App. 25A. It also concluded that calling Cantarella and others would present "a much greater logistical burden" on the government and "sacrifice the orderly conduct of this trial." *Id.* at 25A-26A.

It therefore granted the government's motion to exclude petitioner's extrinsic impeachment evidence. *Ibid.*

The jury found petitioner guilty on all counts, and the district court sentenced him to concurrent terms of life imprisonment. Pet. App. 2A.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1A-10A. As relevant here, it summarily rejected petitioner's claims "concerning various evidentiary rulings and [found] no abuse of discretion or denial of due process." *Id.* at 9A.

ARGUMENT

Petitioner contends (Pet. 15-38) that the courts of appeals are divided on the requirements for admitting evidence of prior inconsistent statements under Federal Rule of Evidence 613(b) and that the district court violated his Fifth and Sixth Amendment rights to due process, confrontation, and "other fair trial rights" (Pet. 15) when it excluded extrinsic evidence of a witness's prior inconsistent statements. The court of appeals' unpublished decision finding no abuse of discretion in the district court's evidentiary ruling does not merit this Court's attention.

1. Federal Rule of Evidence 613(b) provides, in relevant part, as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Rule 613(b) does not specify when the party seeking to introduce the prior inconsistent statement must afford the witness the opportunity to explain or deny the state-

ment. See Fed. R. Evid. 613(b) advisory committee's note to 1972 Proposed Rule 613. As a result, most courts of appeals agree that Rule 613(b) does not prohibit a district court from admitting extrinsic evidence of a prior inconsistent statement solely because the witness's opportunity to explain or deny the statement did not precede its admission. See 4 *Weinstein* § 613.05[2][a] at 613-18 to 613-19 (Feb. 2008 & Feb. 2009); see also, *e.g.*, *United States* v. *Schnapp*, 322 F.3d 564, 571 (8th Cir. 2003) ("The rule, on its face, does not require that the witness be cross-examined about the alleged prior inconsistent statement *before* that statement may be presented as impeachment evidence."); *United States* v. *Bibbs*, 564 F.2d 1165, 1169 (5th Cir. 1977) (Rule 613(b) does not "require that impeachment foundation precede the impeaching witness' [*sic*] testimony."), cert. denied, 435 U.S. 1007 (1978). But see *United States* v. *Bonnett*, 877 F.2d 1450, 1461-1462 (10th Cir. 1989) ("Under Fed. R. Evid. 613(b) and Fed. R. Evid. 801(d)(1), before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same."). "Most courts hold that the requirements of Rule 613(b) are met if the witness has an opportunity to explain after the contents of the statement are made known to the jury," for example by recalling the witness to testify. 4 *Weinstein* § 613.05[2][a] at 613-18 to 613-18.1 (Feb. 2009); see *United States* v. *Moore*, 149 F.3d 773, 781 (8th Cir.) ("One method of providing such an opportunity [for the witness to explain the statement and the opposing party to examine the statement] is to allow recall of the witness after the prior statement is admitted."), cert. denied, 525 U.S. 1030 (1998), and 525 U.S. 1082 (1999).

But while the rule does not forbid the district court from admitting extrinsic evidence when Rule 613(b)'s requirements have not first been satisfied, neither does it require the court to do so. *United States* v. *Young*, 248 F.3d 260, 268 (4th Cir.) ("Rule 613(b), however, speaks only to when extrinsic proof of a prior inconsistent statement is inadmissible; it says nothing about the admissibility of such evidence."), cert. denied, 533 U.S. 961 (2001); *United States* v. *Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987) ("The Rule merely states that a witness must have an opportunity to deny or explain a prior inconsistent statement and that the opposite party must have an opportunity to question him about it if extrinsic evidence of the statement is admitted. The Rule does not state the converse, namely that extrinsic evidence of a prior statement must be admitted in all cases where a witness has had an opportunity to confront and explain it."). Pursuant to their authority to "exercise reasonable control over the mode and order" of a trial (Fed. R. Evid. 611(a)), "trial courts have the discretion to exclude testimony about a prior statement that was not revealed while the witness was on the stand." 4 *Weinstein* § 613.05[2][a] at 613-19 (Feb. 2008).[1]

---

[1] Accord *United States* v. *Barile*, 286 F.3d 749, 756 (4th Cir. 2002) ("Although we conclude that the prior inconsistent statements * * * are admissible under Rule 613(b), our inquiry does not end because, 'even if all the foundational elements of Rule 613 are met, a district court is not unequivocally bound to admit any or all extrinsic evidence of a prior inconsistent statement.' * * * 'Rather, a district court may still exercise its discretion to exclude such evidence.'") (quoting *Young*, 248 F.3d at 268); *United States* v. *Hames*, 185 Fed. Appx. 318, 322 (5th Cir. 2006) (unpublished) (even if Rule 613(b) does not require that impeachment foundation precede the introduction of the impeachment evidence, a district court does not abuse its discretion "when it in fact re-

As a consequence, Rule 613(b)'s "procedure is not mandatory, but is optional at the trial judge's discretion." *Schnapp*, 322 F.3d at 571 (internal quotation marks and citation omitted); see *United States* v. *Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) ("We do not think Rule 613(a) was intended to take away the district judge's discretion to manage the trial in a way designed to promote accuracy and fairness; and while it would be wrong for a judge to say, 'In my court we apply the common law rule, not Rule 613(a),' he is entitled to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors."). Indeed, "confronting a witness with his inconsistent statement prior to its introduction into evidence" continues to be the "*preferred* method of proceeding." *Wammock* v. *Celotex Corp.*, 793 F.2d 1518, 1522 (11th Cir. 1986); *United States* v. *Barrett*, 539 F.2d 244, 255-256 (1st Cir. 1976) (laying prior foundation for extrinsic evidence is "good practice" but not "absolutely required"); see also *id.* at 255 (noting that, when Rule 613 was proposed, the Reporter of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States testified that, in his view, "the existing practice would continue in general to be followed under the rule. It is convenient and effective to raise

---

quires a foundation before admitting extrinsic evidence of the impeachment. * * * To hold otherwise would severely limit the trial courts' broad discretion in controlling the manner and presentation of evidence at trial."); *United States* v. *Surdow*, 121 Fed. Appx. 898, 899 (2d Cir. 2005) (unpublished) (trial court's broad discretion under Fed. R. Evid. 611(b) "permits it to exclude extrinsic impeachment evidence 'that was not revealed while the witness was on the stand,' or at least before the witness was permitted to leave the court") (quoting 4 *Weinstein* § 613.05[1], at 613-19 (2004)).

the matter on cross-examination, and doing so would avoid problems that might ultimately arise if witnesses become unavailable before the end of the trial") (quoting *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 75 (1973)).

2. In this case, after considering relevant factors, the district court exercised its discretion to exclude petitioner's extrinsic impeachment evidence. Pet. App. 22A-26A. This discretion plainly was not abused. In light of petitioner's failure to confront Vitale with the purportedly inconsistent statement or to promptly inform the government and the court that it intended to impeach Vitale with his prior inconsistent statements to Cantarella, the district court was rightfully concerned that producing federal witnesses to New York from other parts of the country, including those in the Witness Security Program, would "present a * * * logistical burden on the Government," *id.* at 25A, "delay the trial," *ibid.*, and interfere with the goal of orderly trial administration embodied in Rules 611(a) and 613(b), *id.* at 26A. The court also properly considered, in excluding the evidence, that the prior inconsistent statements implicated only collateral matters pertaining to Vitale's "role, motive and interest in ordering Perrino's death," *id.* at 25A, and did not relate to petitioner or his participation in Perrino's murder.

3. Contrary to petitioner's suggestion (Pet. 15-19), the district court's decision does not conflict with the First Circuit's decision in *Barrett*, *supra*. *Barrett* held that extrinsic evidence of a prior inconsistent statement was not inadmissible *solely* because the witness was not first given an opportunity to explain it, but nevertheless suggested that the court "might properly in its discre-

tion have refused to receive the [extrinsic impeachment evidence]" had the witness become unavailable for recall or had the district justified its decision by reference to "judicial economy and convenience." 539 F.2d at 256. The district court's decision here was consistent with this approach, as the court excluded petitioner's evidence only after finding that considerations of judicial economy counseled against calling Cantarella. Pet. App. 25A. Moreover, the First Circuit has since clarified that *Barrett* does not call in question the district court's discretionary authority to insist that the foundation required by Rule 613(b) precede admission of the impeachment evidence. *United States* v. *Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992) ("Even if a proponent is not always required to lay a prior foundation under Rule 613(b), a trial court is free to use its informed discretion to exclude extrinsic evidence of prior inconsistent statements on grounds of unwarranted prejudice, confusion, waste of time, or the like. * * * Moreover, *Barrett* notwithstanding, Fed. R. Evid. 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law 'prior foundation' requirement when such an approach seems fitting.").

Given that the courts of appeals, including the First Circuit, have generally committed the admission of extrinsic impeachment evidence to the sound discretion of the trial court, review is not warranted in this case because the outcome would not have been different in any other circuit.[2]

---

[2] In support of his claim of a circuit conflict, petitioner cites a Vermont state case, *State* v. *Danforth*, 956 A.2d 554 (Vt. 2008), that contrasts the First Circuit's "minority" rule that requires the court to inquire into the availability of the witness to be impeached before it can

4. Petitioner's other challenges to the district court's evidentiary ruling do not merit this Court's review. He contends (Pet. 31) that, independent of Rule 613(b), Cantarella's testimony was admissible as a coconspirator statement. This argument is beyond the scope of the question presented by the petition, see Sup. Ct. R. 14(1)(a), and was not made to the court of appeals. It is also wrong: Federal Rule of Evidence 801(d)(2)(E) requires that the "statement by a coconspirator of a

---

exclude the extrinsic evidence with the positions of six other circuits that purportedly reject that approach. Pet. 15-19 & n.2. As petitioner acknowledges (Pet. 16-18), however, *Danforth* ignored other cases from circuits taking the "majority" position that do not *require* that the witness be confronted with the inconsistent statement before it can be introduced. See, *e.g.*, *Moore*, 149 F.3d at 781 (8th Cir.); *Bibbs*, 564 F.2d at 1169 (5th Cir.); *United States* v. *Speece*, No. 92-3077, 1993 WL 17105, *4 (10th Cir. Jan. 26, 1993) (unpublished) (citing *Barrett* for the proposition that "foundation for impeachment by prior inconsistent statements desirable but not absolutely required under the rule if court gives opportunity to explain or deny at some time during trial"). And even courts of appeals that apply the traditional rule by affirming decisions of trial courts to exclude proffered evidence, in particular cases and under the abuse of discretion standard, have left the door open to the admission of the extrinsic evidence before the Rule 613(b) foundation is satisfied. See, *e.g.*, *Schnapp*, 322 F.3d at 572 ("[T]he district court had the option to allow defendant to testify regarding [the witness's] alleged prior inconsistent statement, and then permit the government to recall [the witness] to explain or deny the alleged statement. * * * Upon careful review, we cannot say that the district court's decision to disallow defendant's testimony regarding [the witness's] alleged prior inconsistent statement rises to the level of an abuse of discretion."); *Hames*, 185 Fed. Appx. at 322 (acknowledging that foundation need not precede impeaching witness's testimony, but concluding that trial court did not abuse its discretion in excluding the evidence); *Surdow*, 121 Fed. Appx. at 900 (same).

party" must be offered against the party—not against an opponent.[3]

In addition, petitioner's argument (Pet. 27-28, 32-36) that the district court erred in concluding that the impeachment evidence was collateral misinterprets the district court's ruling. Petitioner relies principally on *United States* v. *Harvey*, 547 F.2d 720 (2d Cir. 1976), for the proposition that a witness's motives, interest and bias in testifying against a defendant are never collateral matters. In that case, the court of appeals held that the district court abused its discretion in excluding evidence (not limited to prior inconsistent statements) that a principal witness was biased against the defendant because he had fathered the witness's child and refused to pay support. Here, by contrast, the proffered evidence did not pertain to Vitale's bias against petitioner, and the district court correctly reasoned (Pet. App. 25A) that Vitale's personal motives (or lack thereof) for wanting to kill Perrino were collateral to the issue of whether petitioner also participated in the murder. For the same reason, because Vitale never claimed that it was petitioner and not he who "wanted Perrino murdered" (Pet. 28), petitioner's contention (Pet. 29) that the admission of the prior inconsistent statement would have "create[d] a reasonable doubt that did not otherwise exist"

[3] Petitioner was not precluded from calling Cantarella as a defense witness to support his theory that Vitale had a personal motive to kill Perrino and that he asked his other associates, and not petitioner, to commit the murder. Indeed, petitioner candidly acknowledged below that he did not want to call Cantarella for that purpose because he wanted to strictly limit the government's cross-examination. See Pet. C.A. App. 202-203. Having made that choice, however, petitioner cannot now complain (Pet. 31) that he was denied the right to elicit testimony from Cantarella that did not involve prior inconsistent statements by Vitale.

is unsupported (quoting *Jimenez* v. *Walker*, 458 F.3d 130, 146 (2d Cir. 2006), cert. denied, 549 U.S. 1133 (2007)).[4]

Finally, petitioner's fact-bound claim (Pet. 24-27) that the district court erred in finding that petitioner did not afford Vitale a sufficient opportunity to deny or explain the statements he made to Cantarella does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

LANNY A. BREUER
Assistant Attorney General

KIRBY A. HELLER
Attorney

JANUARY 2010

---

[4] Petitioner's reliance (Pet. 21) on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), for his similar contention that the district court's evidentiary ruling denied him "the right to present witnesses in his own defense and a fair trial" is unavailing. In *Chambers*, the Court held that due process was violated when a murder defendant was prevented from cross-examining an individual [McDonald] who had given a sworn confession that he was the murderer but later recanted it, and from putting before the jury three witnesses who would have testified that McDonald had confessed to them in circumstances "that provided considerable assurance of [the confessions'] reliability." *Id.* at 300. The trial court's rulings prevented the defendant from effectively challenging McDonald's explanation for the recanted confession, an explanation that would have been difficult to reconcile with the proffered testimony of the three witnesses, which powerfully incriminated McDonald. The limitations imposed in *Chambers* prevented the defendant from raising substantial questions about his alleged guilt; that was not the case here.